The Employed Professional

Prepared by
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for
The Professional Organizations Committee

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Working Paper

#14

THE EMPLOYED PROFESSIONAL

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1979

ISBN 0-7743-3449-5

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SUMMARY AND OVERVIEW

Any inquiry today into the appropriate regulatory environment for professionals requires an analysis of the phenomenon of the salaried professional. This is so not only because salaried professionals are rapidly outnumbering their self-employed counterparts, but also because the appropriate regulatory environment is vastly different for salaried as opposed to self-employed professionals.

A variety of descriptive characteristics of the salaried members of the four professions under analysis suggest a potential to utilize self-government to further their own economic ends. While their income is substantial when compared to that of other workers and even of other professionals, they have lost their extremely favourable relative income position of the 1930's and 1940's, and their income is substantially less than that of their self-employed counterparts. The fact that most are also in the peak income-earning years of their careers also suggests that they may be preoccupied with their professional aspirations and prone to try to protect their income position. For these reasons, granting self-governing powers to salaried professionals runs the risk that those powers will be used to foster the economic self-interest of the professionals rather than the public interest.

It is for the protection of the public that schemes of occupational self-government must have their ultimate rationale. Such power may be justified -- as in the case of many self-employed professionals -- when a complex service is provided on an occasional basis to an uninformed clientele. In these circumstances the clientele cannot be expected to be able to judge effectively the quality of the service, and occupational

licensing may be accepted as one way of assuring some basic degree of public protection.

While these circumstances prevail in the case of many self-employed professionals, they do not prevail in the case of the salaried professional. In the employment context, the employer can be expected to possess the requisite knowledge to judge the quality of the service of its professional employees, and if it does not possess the information internally it has the resources and incentive to acquire the necessary information. This would be true whether the employer is a private sector firm, public sector institution, or professional firm.

Furthermore, there are strong checks to ensure that the employer will act in the public interest with respect to monitoring the services of its professional employees. In the private sector, market pressures will penalize those firms that do not effectively monitor the services of their employed professionals. Even in the non-market sector there are pressures: governments are ultimately beholden to taxpayers; not-for-profit institutions are under budget constraints; and regulated utilities are scrutinized in rate hearings. Professional firms will also be under strong pressure because the reputation of the firm depends on the services of its professional employees. Where these market and non-market pressures are insufficient to guarantee the public interest, there is also recourse to alternative policies such as public inspection, standards legislation, civil liability and consumer protection legislation.

Not only is self-government unnecessary in these circumstances, but it also has disadvantages in the context of salaried professionals. Occupational licensing can result in artificially high salaries for the profession and this ultimately leads to higher prices or taxes to

the consumers. As well, it leads to frustration on the part of those employees who are excluded from the tasks reserved for members of the profession. Licensing can also lead to excessively costly training since it often requires the licensee to be proficient in a full range of tasks, even if they are redundant in a specialized employment context. The credibility of the professional association itself is also weakened if it insists on maintaining licensing powers for its salaried members, since such powers are unnecessary for the public interest and therefore run a serious risk of being self-serving.

These arguments against self-government for salaried professionals apply most strongly when it involves the exclusive-right-to-practice license rather than the reserve-of-title certification. Although the reserve-of-title may impart some informational value to small employers or to clients who deal directly with a salaried professional in the public sector, this is usually not the situation for the four professions under analysis. Furthermore, in the employment context, even the reserve-of-title certification does have disadvantages including the excessive fragmentation of the workforce based on credentialism and the possibility that the reserve-of-title could lead to exclusive rights-to-practice.

For these reasons we strongly recommend against the granting of self-governing powers to salaried professionals. This recommendation is bolstered by two additional observations. First, salaried members of the four professions under analysis are generally in a privileged economic position relative to the rest of the labour force and consequently not granting them a right that would enhance their economic position at the expense of others is a unique opportunity for a public policy to achieve both efficiency and equity objectives.

Second, salaried professionals have a mechanism -- collective bargaining -- to take account of their legitimate employment needs. Needless to say, there would be no justification for permitting salaried professionals to simultaneously and uniquely profit from the advantages of collective bargaining and the protection of self-regulation.

Collective bargaining on the part of salaried professionals has occurred because of the tensions that have arisen when the bureaucratic demands of the employment environment conflict with the individualistic demands of the salaried professional. An employment situation generally connotes supervision, hierarchical controls, specialization and standards -- in essence, a structured environment. Professionals, on the other hand, are generally characterized by a sense of autonomy and a strong allegiance to their profession. When employer and professional objectives conflict, and when professionals are not in a strong position with respect to their individual bargaining power, they often respond by resorting to collective bargaining. This response has been facilitated by its successful use in other sectors, and by the fact that the lofty image of professionalism has been diluted by the growth of the professions.

The collective bargaining response is particularly well-suited to reconcile conflicts between employers and salaried professionals. Under bilateral bargaining, legitimate professional concerns get expressed through the internal trade-offs of the employees themselves and these demands are then required to confront the equally compelling needs of employers and hence the ultimate clients.

Self-regulation, on the other hand, evolved to meet the unique problems of the relationship between the client and the self-employed

professional, and as such it is not well-suited to the employment relationship. It is a process of unilateral decision-making and hence not conducive to confronting the concerns of employers and the general public. Professional associations that also represent the self-employed, have been unwilling or unable to accommodate adequately the employment concerns of their salaried members. In addition, the techniques of occupational control -- admissions criteria, education requirements, definitions of professional conduct, the designation of exclusive rights-to-practise, and codes of ethics -- as utilized by self-governing societies, are neither necessary nor effective in the employment context.

This is illustrated in the case of codes of ethics. Their provisions -- such as those pertaining to advertising, responsibility for clients' funds, fee arrangements, and relationship with other professionals -- usually are not applicable to the employment relationship. When they are, then the codes are either superfluous, since the employer is responsible for the behaviour of its employees, or they create a conflict for the employee who must choose between the demands of the employer and those of the codes of ethics. Where these conflicting demands are legitimate, they can best be dealt with in the context of a collective agreement with its grievance procedure: where they are illegitimate then the parties have recourse to the common law. To argue that codes of ethics simply supplement the law is to set salaried professionals apart from the rest of the workforce -- a policy that, in our opinion, is neither merited nor desirable.

Not only is the process of collective bargaining suitable to the needs of professional employees, but also the basic legal structure can accommodate salaried professionals. This is not contradicted by

by the fact that many professionals are currently excluded from coverage under some current labour relations acts. This situation is a changing one, and it is not one that is applied consistently across all jurisdictions and with respect to all professions. The possibility that the current legislation can accommodate salaried professionals is evident when one examines the situation of the employed professional with respect to the scope of bargaining, the appropriate bargaining agent and the appropriate bargaining unit.

With respect to the scope of bargaining, employed professionals have been able to enhance their professional status by bargaining over such things as continuing education, sabbaticals, attendance at conferences, authorship, patents and royalties. In fact, many of their concerns with respect to automony and independence are ones which are shared by most workers and hence which are being bargained over under the rubric of the "democratization of the work place". Similarly, issues of individual merit can be accommodated within the current scope of collective bargaining. Even issues which traditionally have been regarded as unbargainable because they are management rights or issues of public policy, can be accommodated in the current scope of bargaining. To be sure, checks may be needed to ensure that professional employees do not control issues of public policy for which they are not ultimately accountable. Nevertheless, this applies to all employees, and in fact to all interest groups. In addition, because issues of public policy and employee job rights are not always easy to delineate, it may not be desirable to do so where it would result in denying the employees a meaningful participation in matters which are integral to their professional lives.

With respect to the appropriate bargaining unit, the fact that

some professional employees may exercise managerial authority does not preclude their being able to engage in collective bargaining. Legislative pronouncements in this area have been flexible and adaptable to changing circumstances. Recent trends suggest the limitation of managerial responsibility only to those who make decisions that materially affect the economic lives of subordinates. This would allow most professionals, who have a supervisory but not a managerial function, to engage in collective bargaining.

The managerial issue is simply one of many issues involved in determining the appropriate bargaining unit. Other issues involve the inclusion of related professions, paraprofessionals or of other workers in general. These are all issues, however, that are being resolved in various fashions within the current legislative framework. The trend away from separate craft status and towards bargaining units based on a "community of interests" (of which one's profession is but one aspect), suggests that separate bargaining units for a specific profession will not be prominent. In our view, this trend away from separate bargaining units based on a single profession is desirable since it is a move towards equality of treatment irrespective of skill level, it encourages a stable employment relationship by minimizing jurisdictional disputes based on skill levels, and it encourages the various skill groups to trade off internally their competing demands. If professionals are to be involved in the bargaining units of other employees, however, then they should have representation -- like all other employees - on the Labour Relations Boards that determine those bargaining units.

On the final legal issue -- the appropriate bargaining agent -- we have concluded that professional associations ought not to be allowed

to bargain for their salaried members at the same time as they have the power of occupational licensing. On legal grounds they could often be excluded from acting as the bargaining agent by virtue of the fact that their membership includes those who clearly act in a managerial capacity, or that they received financial support from employers. On more pragmatic grounds, allowing professional associations with licensing powers to bargain for their salaried members would also encourage the narrow craft bargaining that we earlier argued against. The power of occupational licensing would also give salaried professionals, who are already a privileged group economically, an excessive measure of power in any bargaining relationship.

Hopefully, professional societies that represent both salaried and self-employed members -- and this includes the four professions under analysis -- would voluntarily exclude themselves from any collective bargaining function. Only then could they concentrate on the single legitimate function for which they were granted self-governing power -- that function being the occupational licensing or certification of their self-employed members, when such occupational control is in the public interest. To try to retain both collective bargaining and occupational licensing functions would be to increase the risk of promoting the self-interest of the profession at the expense of the public interest.

Having concluded that as between the two traditional techniques of occupational regulation, collective bargaining rather than self-regulation is appropriate to the situation of the employed professional, it follows that professional exclusive-right-to-practise legislation should only apply to this group when expressly agreed to by the employer and his employees. In our view and in light of the

realization that most of the salaried professionals in the professions under scrutiny are employed in the private sector, such legislation should exclude salaried professionals from the scope of its definitions of professional services requiring licensing. This, it might be noted, is a view which has found widespread acceptance in state engineering registration laws in the United States.[1] Put succinctly, the reach of exclusive-right-to-practise provisions of professional statutes should not extend to formal employment relationships. There, in our view, it is more appropriate for the employer, together with employees, to resolve whether and to what extent there should be an obligation to make use of licensed professionals.

The central recommendation of our analysis is that the professional, self-regulation, legislation not apply to the employment environment unless expressly agreed to by the employer and his employees. In other words, the legislation should not apply automatically to the employment environment. That is, application of such legislation would be by mutual consent rather than by legislative fiat. This does not preclude professional societies from having salaried employees as members, nor employers from utilizing licensed professionals, nor salaried professionals from acquiring a license, nor policy makers from utilizing complementary policies (e.g. public inspection, standards legislation, public codes of ethics for salaried employees, and schemes of civil liability) to safeguard the public interest.

However, the fact that the professional statutes would not apply automatically to the employment context does have practical implications, many of which revolve around the following questions: Are there situations when collective bargaining for employed professionals is not a practical possibility, and if so, what should be done in those circumstances? What policy response is appropriate for professions whose membership consists predominantly of salaried professionals

and who are seeking self-regulating status -- and is the response to be the same for those who already have such status? What are the implications of simply allowing employers to chose between licensed and unlicensed professionals and what are the consequences for self-governing professions if their regulations are not applicable in the employment context?

Our responses to these questions generally are contained throughout our analysis. However, it is worth recapitulating them at the outset because of their obvious policy importance. In essence the practical applicability of our analysis is at issue and since we tended to focus on "first principles" more than political realities, then the pragmatism of our analysis merits some elaboration.

On the practical possibility of collective bargaining for salaried professionals, there are situations when problems may arise. This could be the case, for example, if there are only one or two professionals in a firm, or when they do not want to be involved in another bargaining unit, or when some want to engage in collective bargaining and others do not, or if they are prohibited from bargaining by law. However, such circumstances apply to a host of employees, and they are ones for which solutions are either available or are being worked out, usually in the context of labour relations legislation. For example, as we will describe, there is a great deal of flexibility granted to the Labour Relations Boards in their determination of appropriate bargaining units. For those for whom collective bargaining is prohibited by law, we have described ample precedents on which that law could be amended. In the case of those who voluntarily choose not to engage in collective bargaining, then the consequences are of their own making. Moreover, it does not

follow in such circumstances that they should be given the powers of self regulation. In fact, we have argued to exactly the opposite conclusion in Chapter III. In any event, if they do not engage in collective bargaining, whether by choice or by circumstance, then their situation is parallel to that of two-thirds of the labour force in Ontario.

On the appropriate policy response for professions whose membership is predominantly salaried, our message is clear: the self-governing statute and regulations ought not to be made automatically applicable to the employment context. This applies to professionals employed in professional firms, to new professions seeking self-regulation, and even to existing professions, like engineering, that already have self-regulation. This does not mean that such professionals would be prohibited from joining a professional association that regulates its self-employed, or that they would be disqualified from such membership. This is a matter for each professional and each professional association to decide.

There would not be a need to reconcile potentially conflicting demands of the self-governing body and the union or employer because the professional license would simply not extend automatically to the employment context. For example, even in the case where an employer hires a professional employee with a license, it follows from our recommendation that the authority of the self-governing profession would not extend to that employment relationship. As such, there could be no conflict between the standards and regulations of the self-governing society and those of the employer. Similarly, in the case where the parties agreed to have the professional regulations apply to their circumstances, again, by definition,

no conflict could arise.

Nor should there be a problem for those who move back and forth between salaried and self-employment since the licensing bodies already have procedures (re-testing, grandfather clauses, etc.) pertaining to those who enter, for example, from other jurisdictions. This should allow the profession to regulate mobility between salaried and self-employment in a manner consistent with their perception of the public interest.

The inapplicability of the professional license to the employment context does not, of course, preclude salaried professionals from acquiring the license or employers from utilizing licensed professionals, or even requiring that some of their professionals have the licenses. The general inapplicability of the license in the employment context means that the otherwise exclusive right-to-practice simply becomes a reserve-of-title: only those who have the license can use the title, but others can perform "professional" functions as employees. And, although we have emphasized the disadvantages of even a reserve-of-title in the employment context, we recognize that some employers may still choose to utilize employees in that fashion. They may utilize the professional designation as a screening device, especially if they are unable or unwilling to do their own screening, or they may use it to inspire the confidence of the public, in cases where their professionals deal directly with the public. They may even choose -- or be compelled in a negotiating environment -- to accept methods of occupational control such as professional codes of ethics or regulations with respect to the use of paraprofessionals. In the extremes, they may even accept the reserve-of-title as an exclusive right-to-practice: this would depend on their own peculiar

preferences and constraints, including the pressure from their professional and other workforce.

To the extent that the professional license is utilized by employers then it may be sought after and retained even by professionals who will always be in an employment context as well as by those who switch between salaried and self-employment.

The important point about the license in such circumstances is that its desirability comes about because of mutual acceptance on the part of employees and employers. If employers find that their clients want to be served by licensed employees, or if the competing interests of their workforce compel them to utilize licensed employees, then they may do so depending on their other constraints, including the need to provide services at a reasonable cost. The acceptance of the license is self-imposed, rather than being unilaterally imposed by self-governing professional bodies with the sanction of the state.

In the circumstances when employers choose to utilize licensed professionals, they may or may not be bound by <u>all</u> of the provisions of occupational control (e.g. codes of ethics, use of paraprofessionals, etc.) that licensing usually implies. Again, this is a matter to be negotiated by the parties involved, recognizing the problems that may result if conflicts arise over the needs of the firm and the constraints imposed by the different aspects of the professional charter. To be sure, under present circumstances, if employers did not agree to <u>all</u> aspects of the professional license, they could not utilize the designation implied by the full license.

In these circumstances the licensing bodies themselves may adapt to the changing circumstances by trying to make the employment of licensed professionals more attractive to employers. They could do

so by having different licensing requirements -- and hence a different designation -- for professional employees, or by modifying some of their licensing requirements that are especially inapplicable and/or inappropriate in the employment context. Their particular response will depend upon their own circumstances, and will take account of the expected impact of the value of the license for their salaried and self-employed members. The important point about making the license not applicable automatically to the employment context is that the professional associations would be compelled to modify their licensing requirements to make them applicable. And in this process they would be compelled to confront the legitimate needs of employers, the public and other workers, as well as those of their own members. In essence, they would have to sell their product, and they would have a monopoly only insofar as they have a brand-name.

To be sure, there may be problems with the collective bargaining process. We will allude to some of these in the section "Collective Bargaining vs. Self-Regulation for Salaried Professionals" in Chapter IV. As well, the possibility of prejudice being done to the public interest through strikes, inflationary wage settlements and collusive behaviour are real possibilities. However, in weighing the relative advantages and disadvantages of collective bargaining in the context of employed professionals, we feel that the competing interests of employees, employers and the public are explicitly dealt with and more adequately balanced than in a regime of self-regulation.

Those associations that chose not to modify the applicability of their licensing requirements to the employment context would continue to concentrate on their original function -- occupational licensing

or certification of the self-employed, when such control is in the public interest. In essence, they would become more like those associations that already concentrate on representing the self-employed. Whether this is good or bad is beyond the purview of this paper.

Throughout our analysis a number of biases may become apparent -- some may even say, cloud the anslysis: While we feel we can defend these biases, and in most instances have done so in the paper, we fully recognize that they may not be shared by others. Given their obvious impact on our conclusions, it may be useful to make them explicit.

First, we believe in the virtues of the collective bargaining process, and that its advantages outweigh its disadvantages. This belief in collective bargaining is in fact official public policy as evidenced, for example, by the preamble to the Ontario Labour Relations Act. In essence, collective bargaining is a viable way of balancing the legitimate interests of employees, employers and the general public; so is occupational licensing in some contexts. The central argument of our paper, however, is that while occupational licensing may be acceptable in the context of self-employed professionals, collective bargaining is a preferred alternative in the context of salaried professionals.

Second, we believe that, in our present-day society, self-interest is a strong motivating factor and that public policy should recognize this fact. This is true for everything from unemployment insurance to taxation policy to the granting of self-governing powers. We need not regard such motivation as proper or improper -- although we have our own opinion on the matter -- but only as a force that has to be considered in practical questions of public policy. If this

premise is accepted, then our firm belief is that the responsibility of public policy is to provide the institutional framework to ensure that self-interest is consistent with the public interest. This leads us to our preference for collective bargaining over self-regulation as a technique of occupational control for salaried professionals.

Our third bias is one that is probably not so widely shared; however, it is not crucial to the analysis. We feel that public policy should concern itself strongly with issues of equity and income distribution. In the particular circumstances, public policy should be concerned that the instruments of the state -- including the granting of self-governing powers -- not be used to improve the position of already privileged groups, at the expense of the less privileged. In fact, we feel that public policy should be directed towards disadvantaged groups, even if this means, at times, a smaller pie to divide. To the extent that restricting self-government in the employment context reduces the economic position of the salaried professional, there is some consolation to the fact that they are already a relatively privileged group.

I INTRODUCTION

In assessing the appropriateness of various regulatory systems for professionals, it is necessary to analyze the phenomenon of the salaried professional. This is so not only because salaried professionals are rapidly outnumbering their self-employed counterparts, but also because, as we will argue, the appropriate regulatory environment is vastly different for salaried as opposed to self-employed professionals.

The Employed Professional Defined

To many, the term employed or salaried professional may itself be a contradiction in terms. Certainly that is the case for those for whom the term "professional" necessarily refers to someone whose services are rendered directly to members of the public on an ad hoc, occasional, private fee-for-service basis. Professionals working exclusively in an employment relationship would be regarded as lacking the requisite degree of autonomy and personal control over their professional responsibilities to meet the criteria of their professional model. Thus, as Everett Hughes succinctly observed, "The true professional according to the traditional ideology of professions, is never hired."[2] However, a review of the literature, as well as the simple observation of the vast numbers of persons, possessing professional qualifications, who work in an employment relationship, clearly reveals that this perception of the professional model is anything but monolithic. Rather, governmental studies,[3] enacted legislation,[4] and independent commentators[5] all have come to accept the compatibility of the professional and employee status.

We do not intend, in this analysis, to add to the already voluminous literature describing the characteristics which are integral to the

definition of "professionalism". As noted elsewhere, such an effort is not likely to generate some all-encompassing, uniformally accepted list of criteria essential to professional status[6] nor is it likely to add significantly to our understanding of the situation of those whose professional services are rendered exclusively in an employment relationship. Particularly is this so when, increasingly, for many, the concept of a professional corresponds less to a specific way of earning a living or certain behavioural characteristics than it does to the aspirations of various groups for a certain type of social recognition.[7]

From that perspective, and against the observed proliferation of professional occupations,[8] for our purposes the critical definitional issue becomes one of identifying the particular incidents that are attached by society through its customs and laws to the professional status. The identification and delineation of those perquisites bestowed by the legislature is fundamental. It is those legal "derivative" attributes which enhance and ultimately give meaning to the status of a professional vocation and which best explains an era, such as the present, which exhibits a bias toward the "professionalization of everyone".[9] More critically, focusing on those rights by which the legislature has differentiated the professional vocation from other occupation models, permits an analysis of the circumstances and contexts in which it is necessary or indeed appropriate to further extend such legal recognition.

More particularly, one can identify, as standing foremost amongst these derivative rights, the exclusive authority and power to regulate internally the most fundamental aspects of the practice of the profession. It is that authority by which an occupation can sub-

stantially determine, on its own, who will be admitted to their membership and how they will conduct themselves once admitted. It is, ultimately, that legal authority or some variant thereof, delegated by the legislature, which so differentiates the professional from other vocational models and which imbues it with such social prestige.

Why this feature of professionalism should assume such prominence is obvious. Delegating the authority to any occupation to regulate itself (or the power to effectively control any public or quasi-public regulatory agency) can properly be equated with a grant of power to control the market for the services rendered by that occupation. By promulgating rules and regulations (or by possessing the power substantially to determine their content) with respect to the admission, education, work jurisdiction and professional behaviour of the members of the profession, a self-governing vocation will be able to effectively determine the growth and development of a valuable propriatory interest.

Consequently, the critical issue which presents itself for analysis is the identification of those circumstances in which such a delegation of authority is warranted. Specifically, the question to which we shall attempt to respond, is whether such a grant of authority is compatible with, and appropriate for, members of an occupational group whose services are rendered in an employment context.

Employed Professionals in Professional Firms

In distinguishing salaried from self-employed professionals, it is useful to make a further distinction, within the category of

salaried professionals, between those who are employed by professional firms and those who are employed by companies or institutions. This distinction is important because professionals who are employed in professional firms would probably behave more like their self-employed counterparts than like the salaried professionals in corporations or institutions. Ultimately, professionals employed by a professional firm aspire to become partners and hence they adhere to the objectives of the firm. They tend to regard their employee status as a temporary, transitory phase of indenture which can be expected, in usual circumstances, to culminate in their ascending to the status of a self-employed partner. In addition, professionals employed and supervised by fellow professionals are likely to think of themselves as having considerably more intellectual and professional freedom than their employed counterpart in private industry or government. For these reasons they will identify with and behave more like their self-employed counterparts than their salaried counterparts in private industry or public institutions.

However, to the extent that they find the road to becoming a partner impeded, and they find themselves in the position of permanently being an employee in a professional firm, then they would behave more like their salaried counterpart in private companies or public institutions. At present, however, most salaried accountants, architects, engineers and lawyers who are employed in a professional firm, still aspire to partnership and view their employee-type position as transitory.

From their own perspective then, salaried professionals in professional firms identify with their self-employed counterparts. However, from the client's perspective -- and this is what is crucial

for the regulatory environment -- there is an important distinction between the self-employed professional and the salaried professional in a professional firm. That distinction lies in the fact that the professional firm can be an effective intermediary between the salaried professional providing the service and the client who is receiving the service. And, as we will argue, there is an incentive -- that of preserving the brand name of the firm -- for the professional firm to be an effective intermediary.

Thus, although our analysis focuses on the salaried professional in a private corporation or public institution, what we have to say applies in theory to the salaried professional in a professional firm. From the perspective of the salaried professional, the extent to which it applies in practice will depend on the extent to which such professionals regard their employee status as permanent or temporary. If they begin to see their employee position as permanent then they will behave as their salaried counterparts: if they continue to see their position as temporary then they will behave as their self-employed counterparts. From the perspective of the client, the extent to which our analysis applies in practice to the salaried professional in a professional firm depends upon the extent to which clients of professional firms tend themselves to be well informed, and the extent to which the firm serves as an effective intermediary between the client and the salaried professional.

Scope and Nature of Inquiry

The forms of occupational regulation we examine are ones that are currently in existence and are consistent with our mixed, market economy. Specifically, we compare and contrast the virtues of self-

regulation versus collective bargaining as the most effective and equitable ways of reconciling the legitimate occupational ambitions of salaried professionals with the just needs and entitlements of society at large.

In essence it is the contention of this monograph that collective bargaining is for a variety of reasons and against a host of criteria the more preferable of these two existing, publicly acceptable and economically tolerable systems of controlling occupations. We will describe how collective bargaining more carefully and safely balances the interests of the public with the occupational aspirations of salaried professionals. We shall analyze how each method considers questions of allocating human resources, responds to and resolves jurisdictional disputes between professionals and other vocational groups, and attends to issues of conflicts of interest.

We conclude that collective bargaining is a preferable technique of occupational regulation in the context of the employed professional and therefore recommend that the professional, self-regulation, legislation not apply to the employment environment unless expressly agreed to by the employer and his employees. In other words, the legislation should not apply <u>automatically</u> to the employment environment. That is, application of such legislation would be by mutual consent of the parties[10] rather than by legislative fiat. This recommendation does not preclude professional societies from having salaried employees as members, nor employees from utilizing licensed professionals, nor salaried professionals from acquiring a license, nor policy makers from utilizing complementary policies, (such as schemes of public inspection, civil liability or standards legislation)[11] to safeguard the public interest.

II EMPLOYED PROFESSIONALS: A DESCRIPTIVE PICTURE

Before comparing self-government with collective bargaining for salaried professionals, it is instructive to have a descriptive picture of employed professionals. This is important because such factors as their industrial distribution, income position (especially relative to their previous income position and that of their self-employed counterparts), their personal characteristics and their employment history, all have important implications for the causes and consequences of whatever system of occupational control they pursue. In essence, their efforts at occupational control both shape and are shaped by their various characteristics.

Growth and Extent of Salaried Professionalism

In Canada, as in most developed economies, the professions have been growing relative to the total labour force. Within this growing category of professions, salaried or employed professionals have been increasing relative to the self-employed.

For the four professions analyzed in this study, Table 1 illustrates the large and usually growing proportion of salaried professionals. By 1971, accountants and engineers were almost exclusively salaried, architects had a majority in salaried employment, and even lawyers were rapidly reaching the point where almost half were salaried. Clearly, the image of the professional as an autonomous, independent, self-employed practitioner does not apply to the four professions under scrutiny. Consequently, any analyses of these professions requires recognition of the phenomenon of salaried professionals.

TABLE 1

PROPORTION OF PROFESSIONAL LABOUR FORCE THAT IS SALARIED, CANADA, 1961 AND 1971

	Total Number[1]		Proportion Salaried	
Profession	1961	1971	1961	1971
Accountants	30,066	103,020	.86	.93
Architects	2,636	4,045	.65	.61
Engineers	41,779	75,459	.96	.99
Lawyers	11,780	16,320	.32	.45
All professions	524,802	1,063,580[2]	.90	.94[2]
All occupations	5,262,118	8,626,925	.91	.89

Source: 1961 Census report 98-502, Vol. 4, Part 4 and 5; and 1971 Census report 94-723, Vol. 3, Part 2, Bulletin 3.2-9.

Notes: 1. Salaried plus self-employed plus a small number of unpaid family workers in labour force.

2. The 1971 Census does not use the professional occupational title as do earlier censuses. It is taken here to mean those in the following six major occupational groups: natural science, engineering and mathematics; social science; religion; teaching; medicine and health; and artistic, literary and recreational.

Industrial Distribution

Table 2 illustrates that the majority of accountants, engineers and lawyers in Ontario are in the private sector. This is in contrast to the situation for most other professions where the public sector is the dominant employer of professionals, employing over two-thirds of all professionals with the remaining one-third being heavily dependent upon public funds.[12] As will be argued later, this has important implications since in the private sector, the market can be expected to exert an important constraining influence to ensure that the behaviour of salaried professionals is in line with the public interest.

TABLE 2

INDUSTRIAL DISTRIBUTION OF LAWYERS, ARCHITECTS AND ENGINEERS IN ONTARIO, 1973

Industry	Number			Percent of Total		
	Law	Architects	Engineer	Law	Architects	Engineer
Private Sector						
Agriculture	15	0	145	.2	0	.5
Mines, quarries, oil	20	0	875	.2	0	2.8
Durable mfg.	115	10	6700	1.3	.6	21.4
Non-durable mfg.	145	5	4305	1.6	.3	13.7
Construction	20	60	1595	.2	3.9	5.1
Trade	160	30	950	1.7	1.9	3.0
Finance, ins., realty	490	70	460	5.3	4.5	1.5
Personal service	120	0	270	1.3	0	.9
Business service	6355	1085	4690	69.3	69.6	15.0
Total private	7440	1260	19990	81.1	80.7	63.8
Public Sector						
Trans., com., util.	160	10	3640	1.7	.6	11.6
Education	335	130	3065	3.7	8.3	9.8
Health, welfare	30	0	75	.3	0	.2
Religious	15	0	10	.2	0	0
Federal admin.	705	90	3275	7.7	5.8	10.5
Provincial admin.	395	25	750	4.3	1.6	2.4
Local admin.	90	45	530	1.0	2.9	1.7
Total public	1730	300	11345	18.9	19.2	36.2
All industries	9170	1560	31,335	100	100	100

Source: Highly Qualified Manpower Survey, Statistics Canada, 1973, Table 26.

Notes: The last digit of each number has been randomly rounded to zero or five to preserve confidentiality. Consequently small numbers are not accurate and the numbers may not sum exactly to the total. Separate data for accountants was not available.

Current Income Position and Growth

Table 3 gives the employment income for the four professions as of 1970. The ranking from high to low in terms of employment income is lawyers, architects, engineers and accountants. The four professions are predominantly male, and males earn approximately twice as much as females. Ontario earnings are higher than in the rest of Canada and the fact that the median earnings are less than the average means that the earnings distribution is skewed to the right; that is, more than half have earnings less than the average but a few have extremely high earnings and this inflates the average. This is especially the case for lawyers and architects where a few individuals have extremely high earnings.

TABLE 3

WORKERS[1] AND EMPLOYMENT INCOME[2] FOR PROFESSIONALS, ONTARIO AND ALL CANADA, 1971 CENSUS

Number and Income	Accountants[3]	Architects[4]	Engineers[5]	Lawyers[6]
Ontario				
Number:				
Male	34,305	1,485	35,345	6,565
Female	6,690	n.a.	560	385
Both	40,995	1,485	35,905	6,950
Average Income:				
Male	10,571	15,101	11,190	21,992
Female	5,730	n.a.	6,299	8,437
Both	9,781	15,101	11,114	21,241
Median Income:				
Male	9,872	12,776	11,081	18,622
Female	5,631	n.a.	5,944	7,257
Both	9,180	12,776	11,001	17,992
Canada				
Number:				
Male	89,745	3,985	74,070	15,735
Female	16,715	115	1,115	850
Both	106,460	4,100	75,185	16,585
Average Income:				
Male	9,988	14,405	11,057	19,850
Female	5,423	5,391	6,436	8,402
Both	9,271	14,152	10,998	19,263
Median Income:				
Male	9,346	12,253	10,973	16,247
Female	5,337	3,800	6,054	7,254
Both	8,717	12,016	10,900	15,786

Source: 1971 Census of Canada, Employment Income Vol. III, Part 6, No. 94-765, Bulletin 3.6-7 for Canada and No. 74-766, Bulletin 3.6-8 for Ontario.

Notes:
1. Persons 15 years and over who worked in 1970 and who reported employment income.
2. Wages and salaries plus net income for self-employment plus net income from farm operation, for the 1970 calendar year.
3. Accountants, auditors and other financial officers: CCDO 1171.
4. CCDO group 2141.
5. CCDO groups 2142-2157. The figures for all engineers are not published separately. Consequently the number of engineers is obtained by adding the number in each CCDO 2142-2157 and their average income figure is a weighted average obtained by multiplying the number in each category by their respective average income and then dividing by the total number of engineers.
6. Lawyers and notaries: CCDO 2343.

The growth of the earnings of salaried architects, engineers and lawyers is given in Table 4 which also compares their earnings to those of all occupations. Their earnings are restricted to employment earnings and consequently are at times less than total employment income as given in Table 3, which also includes net income from self-employment. Clearly, the salaried professionals have favourable earnings relative to those in all occupations, and even relative to those of all professions. As the bottom half of the table illustrates, the ratio of salaried professional earnings to earnings in all occupations was extremely high in the 1930's, reaching a low in the early 1950's. Thereafter it has tended to increase again slightly, although this increase has levelled off by the 1970's. Thus, while they still occupy a favourable position relative to other employees, and relative to other salaried professionals in general, salaried architects, engineers and lawyers have lost their extremely favourable position of the 1930's and 1940's.

TABLE 4

EARNINGS OF SALARIED PROFESSIONALS,

CANADIAN MALES, 1931-1971

Profession[2]	1931	1941	1951[1]	1961	1971
	AVERAGE ANNUAL INCOME				
Architects	2,591	2,246	3,712	6,694	12,496
Engineers - Electrical	2,443	2,363	3,817	7,329	11,139
Engineers - Mechanical	2,315	2,232	3,774	7,004	10,864
Lawyers & Notaries	3,236	2,833	3,987	7,366	14,597[3]
All Professionals	1,978	1,746	3,011	5,507	8,522
All Occupations	925	993	2,131	3,660	6,606
	RATIO OF SALARIED PROFESSIONAL EARNINGS TO EARNINGS IN ALL OCCUPATIONS				
Architects	2.8	2.3	1.1	1.8	1.9
Engineers - Electrical	2.6	2.4	1.8	2.0	1.7
Engineers - Mechanical	2.5	2.3	1.8	1.9	1.6
Lawyers & Notaries	3.5	2.9	1.9	2.0	2.2
All Professionals	2.1	1.8	1.4	1.5	1.3

Source: Extracted from Table 1 in M. Gunderson, "Economic Aspects of the Unionization of Salaried Professionals". in M. Trebilcock and P. Slayton (eds.), The Professions and Public Policy, University of Toronto Press, 1977. Figures for 1931-61 were from N. Meltz, Manpower in Canada 1931-1961: Historical Statistics of the Canadian Labour Force, Ottawa:Manpower and Immigration, 1969, pp. 242,246. Figures for 1971 were from the 1971 Census, Income of Individuals, No. 94-765, Vol. 3, Part 6, Bulletin 3.6-7, Ottawa: Information Canada, 1975.

Notes:

1. Figures for 1951 refer to median earnings.

2. Accountants are not included because of lack of historical data.

3. Weighted average of professional incomes for CCDO occupations 21,23, 25,27,31 and 33.

While the employment income for the four professions is substantial when compared to the earnings of other workers, it is small when compared to the net income of their self-employed counterparts. These latter figures are given in Table 5.[13]

With their self-employed counterparts having such substantial earnings, it is to be expected that salaried professionals would express concern over their income positions. The favourable income positions of the self-employed in these four professions is highlighted by other comparisons within Table 4. It is clearly substantial when compared to the earnings of all employees, and even when compared to all other professions, even though the latter includes such high income groups as doctors and dentists. In addition, the self-employed have experienced substantial income gains. Since 1951, the income increase has been nearly five-fold for self-employed accountants and lawyers and over three-fold for engineers and architects: this latter figure is of the same magnitude as that of all employees. Furthermore, the self-employed in the four professions have been in a relatively favourable tax position. While the average tax rate for all employees and all other professions (as defined in Table 5) has approximately doubled between 1951 and 1974, the average rate increased only slightly for self employed engineers and architects, and by only 50 per cent for self-employed lawyers. Only for accountants did the average tax rate double as for all employees and for other self-employed professions.

Clearly, the self-employed in the four professions under analysis are in a relatively favourable economic position with respect to their current income, the growth of that income, and their tax position. Since they are the most obvious reference group for

TABLE 5

INCOME[1] BEFORE TAX AND AVERAGE TAX RATE[2] FOR SELECT SELF-EMPLOYED[3] PROFESSIONALS AND EMPLOYEES, ONTARIO 1946-1974

Year	Accountant		Engineer/Architect		Lawyer/Notary		Other Professions[4]		Employees[5]	
	Income	Tax	Income	Tax	Income	Tax	Income	Tax	Income	Tax
1974	33,888	.30	37,018	.33	47,767	.35	28,750	.34	10,056	.17
1973	30,660	.29	27,520	.31	42,200	.34	26,680	.31	8,930	.18
1972	22,490	.27	21,500	.29	34,890	.33	25,610	.32	8,233	.18
1971	20,720	.29	21,990	.32	31,820	.37	25,530	.34	7,592	.18
1970	22,540	.29	22,220	.27	32,730	.35	22,910	.34	6,804	.17
1969	19,030	.27	23,400	.32	31,000	.34	21,430	.32	6,354	.16
1968	18,110	.25	22,450	.32	27,850	.33	20,220	.31	5,945	.14
1967	15,460	.23	21,590	.31	26,090	.30	18,320	.28	5,528	.13
1966	15,340	.21	21,530	.28	24,930	.29	17,310	.26	5,236	.12
1965	14,020	.21	19,100	.27	21,960	.27	15,310	.25	4,935	.11
1963	13,830	.22	16,430	.26	20,200	.27	14,750	.25	4,723	.11
1963	11,100	.20	14,810	.25	18,200	.26	13,710	.23	4,509	.10
1962	11,620	.19	13,630	.25	17,180	.25	12,250	.22	4,398	.10
1961	12,460	.21	13,590	.24	18,340	.26	12,330	.22	4,290	.10
1960	12,680	.22	15,900	.25	17,260	.27	11,350	.21	4,160	.10
1959	11,210	.20	14,900	.23	17,570	.26	12,370	.18	3,996	.09
1958	10,940	.18	16,340	.26	16,100	.24	10,660	.19	3,883	.09
1957	10,970	.20	15,620	.27	15,720	.24	9,450	.19	3,716	.09
1956	9,900	.20	15,900	.27	15,820	.26	9,010	.19	3,534	.09
1955	9,340	.19	13,180	.24	15,800	.26	8,780	.20	3,373	.09
1954	10,410	.22	11,910	.25	15,900	.28	7,920	.19	3,273	.09
1953	7,960	.19	12,620	.27	12,000	.26	7,650	.20	3,207	.09
1952	9,040	.25	13,130	.32	10,570	.24	7,110	.21	3,107	.10
1951	6,600	.16	10,720	.27	11,250	.25	6,730	.18	2,918	.08
1950	n.a.	n.a.	12,700	.28	10,910	.23	n.a.	n.a.	2,708	.07
1949	n.a.	n.a.	9,580	.24	10,880	.23	n.a.	n.a.	2,610	.07
1948	n.a.	n.a.	8,380	.23	8,690	.22	n.a.	n.a.	2,347	.09
1947	n.a.	n.a.	8.030	.27	8,540	.27	n.a.	n.a.	2,165	.09
1946	n.a.	n.a.	6,880	.32	7,540	.32	n.a.	n.a.	1,884	.12

Source: Computed from data in Taxation Statistics, Revenue Canada, annual issues.

Notes:
1. The income figure was obtained by dividing total income net of expenses by the number of taxable returns.
2. Average tax per person divided by income before tax.
3. Salaried professionals are grouped with employees.
4. All self-employed professionals less self-employed accountants, lawyers/notaries, and engineers/architects.
5. Generally employees of business, institutions, government, and teachers.

their salaried counterparts, it is understandable that the latter group would want to emulate their success.

A comparison of the earnings of salaried, relative to self-employed professionals is given in Table 6, based on a single data source, the 1971 Census. Clearly, salaried professionals do not earn as much as their self-employed counterparts and this relationship prevailed in 1961 as well as in 1971. As the note to the table indicates, however, comparisons between the 1961 and 1971 ratios should only be made with caution because of changes in the occupational classification scheme. Based on the ratios of Table 6, we can conclude that for the four professions under analysis, salaried members tend to earn 60-80 per cent of the earnings of their self-employed counterparts. While this gap may create some discontentment in the ranks of salaried professionals, we should keep in mind the extremely favourable earnings position of the self-employed group. Even with the caveat that salaried employees earn only 60-80 per cent of the income of their self-employed counterparts, their resulting income still leaves them in a favourable economic position.

TABLE 6

EARNINGS OF SALARIED VERSUS SELF-EMPLOYED,

CANADIAN MALES, 1961 AND 1971.

Profession	Salaried Income		Self-Employed Income		Salaried/Self-Emp.	
	1961	1971	1961	1971	1961	1971
Accountant	6,195	9,615	10,593	15,269	.58	.63
Architect	6,694	12,496	12,545	17,407	.53	.72
Engineer	7,228	11,011	11,895	13,826	.61	.80
Lawyer	7,359	14,597	12,550	23,930	.59	.61

Source: Extracted from Table 2 in M. Gunderson, "Economic Aspects of the Unionization of Salaried Professionals." in M. Trebilcock and P. Slayton (eds.), The Professions and Public Policy, University of Toronto Press, 1978. Figures for 1961 salaried income were from 1961 Census, report 94-539, Vol. 3, Part 3. Figures for 1961 self-employed income are from report 98-502, Vol. 4, Part 4. Figures for 1971 are from 1971 Census, Incomes of Individuals, report 94-765, Vol. 3, Part 6, Bulletin 3.6-7.

Note: Extreme caution should be utilized in comparing the ratio of salaried to self-employed earnings between 1961 and 1971 since changes in the occupation classification system have occurred over that period. If, for example, some salaried technicians were classified as engineers, in 1961 but were classified as technicians in 1971, then this would deflate the 1961 salaried income of engineers relative to 1971, since technicians would have lower earnings than engineers. Thus, much of the increase in the ratio of the earnings of salaried professionals relative to their self-employed counterparts may come about because some lower wage "paraprofessionals" may have been reclassified elsewhere in the 1971 census.

Table 7 also portrays the income position of the four professions in Ontario. Being based on the Highly Qualified Manpower data, the figures are only for those with a university degree. Comparing the numbers with a university degree (Table 7) with all workers in the profession (Table 3) indicates that many accountants and auditors do not have an advanced degree. The income figures confirm the earlier generalizations: the ranking in terms of income is lawyers and architects, with engineers and accountants being fairly similar; males earn considerably more than females; and the average income is greater than the median (especially for lawyers and architects), which indicates that their earnings distribution is skewed to the right, with a few individuals having very high earnings. The data also indicates that, especially for males, most numbers in these professions are full-time, full-year workers. Amongst females there are proportionately fewer full-time full-year workers; however, even for such female workers their income is considerably lower than male income.

TABLE 7

INCOME BY PROFESSION AND SEX, ONTARIO, 1973

Profession	All Persons			Full-time and 40-52 Weeks		
	Number	Average Income	Median Income	Number	Average Income	Median Income
			(Male)			
Accountants/auditors	6100	16200	14900	5770	16600	15300
Architects	1105	21000	17100	1070	21300	17300
Civil engineers	3870	17200	17100	3755	17500	17300
Electrical engineers	3955	16200	16400	3845	16400	16500
Industrial engineers	2170	17000	17000	2105	17300	17200
Mechanical engineers	2605	15900	16000	2490	16300	16200
Other arch., eng.	2950	15700	15700	2760	16300	16100
Lawyers & notaries	5440	27500	23300	4755	30600	25800
			(Female)			
Accountants/auditors	545	9900	9700	385	10600	11200
Architects	20	11900	14000	10	--	--
Civil engineers	35	12100	12600	25	--	--
Electrical engineers	15	--	--	10	--	--
Industrial engineers	80	4900	4500	25	--	--
Mechanical engineers	--	--	--	--	--	--
Other arch., eng.	20	12500	12600	20	--	--
Lawyers & notaries	205	16700	14400	165	19700	16900

Source: Highly Qualified Manpower Survey, Statistics Canada, 1973, Table 28.

Age and Sex Composition

Table 8a gives the age distribution by sex for those in the four professions in Ontario and Table 8b gives the actual numbers from which the distribution was derived. The figures are from the Highly Qualified Manpower Survey and consequently only included those with a university degree. As the data indicates, the vast majority of these professionals are in the peak earnings years of their careers, between 25 and 50 years of age. The only unusual patterns are a disproportionately large number of accountants aged 24-28 and a disproportionately large number of architects aged 44-53. For females, the figures illustrate a disproportionately large number of young females (presumably indicating that they are beginning to enter these traditionally male-dominated professions) and a disproportionately small number in the 29-38 year age groups (presumably because of child raising).

TABLE 8a

DISTRIBUTION OF ACCOUNTANTS, ARCHITECTS, ENGINEERS, AND LAWYERS IN ONTARIO, BY AGE AND SEX, 1973

Age	Accountants	Architects	Engineers	Lawyers
		Males		
< 24	0.5	0	.1	0
24 - 28	29.2	4.6	15.5	14.6
29 - 33	18.5	20.9	20.6	23.0
34 - 38	14.9	18.2	17.1	17.7
39 - 43	10.7	14.7	12.5	14.1
44 - 53	15.5	29.7	23.5	16.4
54 +	11.0	12.0	11.3	14.2
All ages	100.0	100.0	100.0	100.0
		Females		
< 24	0	0	0	0
24 - 28	34.5	45.5	25.0	21.8
29 - 33	10.0	9.1	15.6	30.9
34 - 38	3.6	0	12.5	10.9
39 - 43	24.5	9.1	6.3	9.1
44 - 53	20.0	27.3	37.5	23.6
54 +	5.5	9.1	3.1	5.5
All ages	100.0	100.0	100.0	100.0

Source: Computed from Highly Qualified Manpower Survey, Statistics Canada, 1973, Table 18 (microfilm).

Note: For the actual numbers, the last digit of each number has been randomly rounded to zero or five to preserve confidentiality. Consequently small numbers are not accurate and the numbers may not sum exactly to the total. Age was calculated by subtracting the year of birth from 1973.

TABLE 8b

NUMBER OF ACCOUNTANTS, ARCHITECTS, ENGINEERS AND LAWYERS IN ONTARIO, BY AGE AND SEX, 1973

Age	Accountants Auditors	Architects	Engineers	Lawyers
		Males		
< 24	30	0	15	0
24 - 28	1945	60	2605	1015
29 - 33	1230	270	3460	1600
34 - 38	990	235	2870	1230
39 - 43	715	190	2105	980
44 - 53	1030	385	3950	1140
54 +	735	155	1905	990
All ages	6,665	1,295	16,810	6,955
		Females		
< 24	0	0	0	0
24 - 28	190	25	40	60
29 - 33	55	5	25	85
34 - 38	20	0	20	30
39 - 43	135	5	10	25
44 - 53	110	15	60	65
54 +	30	5	5	15
All ages	550	55	160	275

Source: Computed from Highly Qualified Manpower Survey, Statistics Canada, 1973, Table 18.

Note: The last digit of each number has been randomly rounded to zero or five to preserve confidentiality. Consequently small numbers are not accurate and the numbers may not sum exactly to the total. Age was calculated by subtracting the year of birth from 1973.

Previous Occupation

For those professionals over 30 with a university degree, the data of Tables 9a through 9g give the occupations of their first full-time job. Clearly, the majority of professionals in the four professions had the same occupation as their first full-time job. This is especially the case for architects, lawyers and most engineering groups. For accountants, many have worked their way up from book-keeping and other clerical jobs, and for industrial engineers many have come from other engineering backgrounds. However, in most cases the vase majority of professionals in the four professions under analysis have not switched from other professions or occupations, but have remained in their professions.

TABLE 9a

ACCOUNTANTS, AUDITORS AND OTHER FINANCIAL OFFICERS AGE 30+ AND WITH A DEGREE, BY OCCUPATION OF FIRST FULL-TIME JOB, CANADA, 1973

Occupation of First Job After Graduation	Number	Percent
Accountants, auditors and other financial officers	6915	52.3
Bookkeepers, accounting clerks	2865	21.7
Other clerical occupations	765	5.8
Not stated	345	2.6
Occupations related to mgt. and admin.	200	1.5
Secondary school teachers	180	1.4
Supervisors: sale occupations, commodities	170	1.3
Commissioned officers, armed forces	165	1.2
Other technical and service sales occupations	135	1.0
Elementary school teachers	120	.9
Other occupations in natural sci., eng., & math.	110	.8
Social workers	80	.6
Personnel and related officers	80	.6
Civil engineers	75	.6
Economists	65	.5
Other occupations in soc. sci., and related fields	65	.5
Electrical engineers	60	.5
System analysts, computer program. & related occ.	60	.5
Commercial travellers	60	.5
Other	695	5.3
Total	13,210	100

Source: Highly Qualified Manpower Survey, Statistics Canada, 1973, Table 43.

TABLE 9b

ARCHITECTS AGE 30+ AND WITH A DEGREE, BY OCCUPATION OF FIRST FULL-TIME JOB, CANADA, 1973

Occupation of First Job After Graduation	Number	Percent
Architects	2025	77.3
Other occupations in natural sci., eng. and math.	325	12.4
Not stated	65	2.5
Other soc. scientists, soc. workers and librarians	30	1.1
University teachers	25	1.0
Civil engineers	20	.8
Other architects and engineers	20	.8
Commissioned officers, armed forces	20	.8
Agriculturists and related scientists	15	.6
Other occ. in soc. sci. and related fields, N.E.C.	15	.6
Other clerical occupations	15	.6
Accountants, auditors and other financial officers	10	.4
Fine arts school teachers	10	.4
Other artistic, literary, rec. and rel. occupations	10	.4
Construction trades occupations	10	.4
Other occupations	5	.2
Total	2620	100

Source: Highly Qualified Manpower Survey, Statistics Canada, 1973, Table 43.

TABLE 9c

LAWYERS AND NOTARIES AGE 30+ AND WITH A DEGREE,
BY OCCUPATION OF FIRST FULL-TIME JOB, CANADA, 1973

Occupation of First Job After Graduation	Number	Percent
Lawyers and notaries	10175	75.0
Other occupations in soc. sci. and related fields	1480	10.9
Not stated	465	3.4
Commissioned officers, armed forces	180	1.3
Other clerical occupations	170	1.3
Secondary school teachers	110	.8
Accountants, auditors and other financial officers	95	.7
Occupations related to mgt. and administration	90	.7
Other technical and sales occupations	90	.7
Government administrators	45	.3
Personnel and related officers	45	.3
Bookkeepers and accounting clerks	45	.3
Other armed forces & police off. & detectives, gov't.	35	.3
Other sales occupations	35	.3
Commercial travellers	30	.2
Other artistic, literary, rec. and rel. occupations	30	.2
University teachers	30	.2
Chemists	25	.2
Writers and editors	25	.2
Secretaries and stenographers	25	.2
Other	335	2.5
Total	13,560	100

Source: Highly Qualified Manpower Survey, Statistics Canada, 1973 Table 43.

TABLE 9d

CIVIL ENGINEERS AGE 30+ AND WITH A DEGREE,
BY OCCUPATION OF FIRST FULL-TIME JOB, CANADA, 1973

Occupation of First Job after Graduation	Number	Percent
Civil engineers	9675	78.7
System analysts	395	3.2
Not stated	375	3.1
Commissioned officers, armed forces	285	2.3
Other architects and engineers	245	2.0
Mechanical engineers	205	1.7
Electrical engineers	145	1.2
Industrial engineers	100	.8
University teachers	90	.7
Primary occupations	70	.6
System analysts, computer program. & related occ.	60	.5
Other technical and service sales occupations	55	.4
Government administrators	50	.4
Agriculturists and related scientists	45	.4
Commercial travellers	45	.4
Construction trades	40	.3
Occupations related to mgt. and admin.	40	.3
Post-secondary school teachers	40	.3
Geologists	35	.3
Architects and eng. technologists	35	.3
Other	265	2.2
Total	12,295	100

Source: Highly Qualified Manpower Survey, Statistics Canada, 1973, Table 43.

TABLE 9e

ELECTRICAL ENGINEERS AGE 30+ AND WITH A DEGREE,
BY OCCUPATION OF FIRST FULL-TIME JOB, CANADA, 1973

Occupation of First Job After Graduation	Number	Percent
Electrical engineers	6840	77.6
Commissioned officers, armed forces	330	3.7
Not stated	210	2.4
Other occupations in natural sci., eng. and math.	140	1.6
Civil engineers	140	1.6
Construction trades	115	1.3
Mechanical engineers	105	1.2
Other architects and engineers	105	1.2
Process., machinery, fabrication	105	1.2
Other technical and service sales occupations	85	1.0
University teachers	80	.9
Other occupations	70	.8
Mechanical engineers	65	.7
Architects and engineer technologists	60	.7
Other clerical occupations	50	.6
Other teaching and related occupations	40	.5
Occupations related to mgt. and admin.	35	.4
Other sales occupations	30	.3
Other natural scientists	25	.3
System analysts, computer program. & related occ.	25	.3
Other	165	1.9
Total	8820	100

Source: Highly Qualified Manpower Survey, Statistics Canada, 1973, Table 43.

TABLE 9f

INDUSTRIAL ENGINEERS AGE 30+ AND WITH A DEGREE,
BY OCCUPATION OF FIRST FULL-TIME JOB, CANADA, 1973

Occupation of First Job After Graduation	Number	Percent
Industrial engineers	1200	39.9
Other architects and engineers	250	8.3
Mechanical engineers	230	7.7
Electrical engineers	185	6.2
Commissioned officers, armed forces	155	5.2
Civil engineers	150	5.0
Other occupations in natural sci., eng., and math.	90	3.0
Chemists	70	2.3
System analysts, computer program. & related occ.	65	2.2
Not stated	55	1.8
Secondary school teachers	55	1.8
Accountants, auditors and other financial officers	45	1.5
Other technical and sales occupations	45	1.5
Process., machinery, fabrication, assembly	35	1.2
Personnel and related officers	30	1.0
Primary occupations	30	1.0
Other teaching and related occupations	25	.8
Economists	25	.8
Construction trades	25	.8
Other	240	8.0
Total	3005	100

Source: Highly Qualifed Manpower Survey, Statistics Canada, 1973, Table 43.

TABLE 9g

MECHANICAL ENGINEERS AGE 30+ AND WITH A DEGREE,
BY OCCUPATION OF FIRST FULL-TIME JOB, CANADA, 1973

Occupation of First Job After Graduation	Number	Percent
Mechanical engineers	4260	69.8
Civil engineers	230	3.8
Secondary school engineers	220	3.6
Other architects and engineers	210	3.4
Commissioned officers, armed forces	205	3.4
Electrical engineers	115	1.9
Industrial engineers	115	1.9
Other technical and service sales occupations	105	1.7
Not stated	85	1.4
Process., machinery, fabrication	65	1.1
Other occupations	65	1.1
Primary occupations	55	.9
Occupations related to mgt. and administration	50	.8
Architects and engineer technologists	45	.7
Commercial travellers	35	.6
Other clerical occupations	35	.6
Other managers and administrators	30	.5
University teachers	25	.4
Secondary school teachers	20	.3
Other teaching and related occupations	20	.3
Other	115	1.9
Total	6105	100

Source: Highly Qualified Manpower Survey, Statistics Canada, 1973, Table 43.

This pattern of professional in-breeding is confirmed in the data of Tables 10a through 10g which give, for those professionals over 40 with a university degree, their occupation at age 30. Again, the vast majority of older persons in the four professions under analysis have come through the ranks of the profession, or as in the case of accountants and industrial engineers, from closely related professions. The substantial proportion of those giving "no occupation" at age 30 presumably reflects persons in school or household activity at that time.

This observation that most professionals have always been in the same profession has a variety of implications for our later analyses. In such circumstances professionals may be expected to be insular and to have a narrow focus on their own professions. This tendency towards insularity is compounded by the fact that the main source of entrants into the profession will come from professional schools which can be expected to be well-indoctrinated in the virtues of their profession. In addition, as our description reveals, the employment interest of professionals tends to be tied to their particular profession since it has provided them with the vehicle for their progress through the profession.

These resulting characteristics of professionals can have an impact on their behaviour. Having little experience outside their one profession and having their employment interests so dependent upon their particular profession, understandably they would be suspicious of change and of encroachment on their professional prerogatives. In schemes of self-government they may also be prone to overemphasize their own self-interest which is so inextricably tied to their profession.

TABLE 10a

ACCOUNTANTS, AUDITORS AND OTHER FINANCIAL OFFICERS AGE 40+ AND WITH A DEGREE, BY OCCUPATION AT AGE 30, CANADA, 1973

Occupation at Age 30	Number	Percent
Accountants, auditors, and other financial officers	4485	61.7
Bookkeepers and accounting clerks	650	9.0
No occupation	480	6.6
Other clerical occupations	250	3.4
Occupation related to management and administration	210	3.0
Commissioned officers, armed forces	155	2.1
Personnel and related officers	110	1.5
Other technical and sales occupations	70	1.0
Supervisors: sale occupations, commodities	65	.9
Other occupations in natural science, eng., and math.	60	.8
Economists	60	.8
Government administrators	55	.8
Administrators in teaching and related fields	50	.7
University teachers	45	.6
Secondary school teachers	45	.6
Process, machin., fabrication	45	.6
Other sales occupations	35	.5
Commercial travellers	30	.4
General managers	25	.3
Other	340	4.7
Total	7265	100.0

Source: Highly Qualified Manpower Survey, Statistics Canada, 1973, Table 41.

TABLE 10b

ARCHITECTS AGE 40+ AND WITH A DEGREE,
BY OCCUPATION AT AGE 30, CANADA, 1973

Occupations at Age 30	Number	Percent
Architects	1175	70.8
No occupation	230	13.9
Other occ. in natural sci., eng., and math.	130	7.8
Commissioned officers, armed forces	25	1.5
Civil engineers	20	1.2
Construction trades occupations	15	.9
Other	65	3.9
Total	1660	100.0

Source: Highly Qualified Manpower Survey, Statistics Canada, 1973, Table 41.

TABLE 10c

LAWYERS AND NOTARIES AGE 40+ AND WITH A DEGREE, BY OCCUPATION AT AGE 30, CANADA, 1973

Occupation at Age 30	Number	Percent
Lawyers and notaries	6650	78.9
No occupation	805	9.6
Commissioned officers, armed forces	260	3.1
Other occ. in soc. sci. and rel. fields, N.E.C.	180	2.1
Other technical and service sales occup.	50	.6
Accountants, auditors and other financial off.	45	.5
Occ. rel. to mgt. and administration, N.E.C.	45	.5
Supervisors: sales occupations, commodities	40	.5
Other armed forces & police off. & det., gov't	35	.4
Government administrators	25	.3
Other clerical occupations	25	.3
Not stated	25	.3
Secondary school teachers	20	.2
Writers and editors	20	.2
Secretaries and stenographers	20	.2
Other service occupations	20	.2
Primary occupations	20	.2
Personnel and related officers	15	.2
University teachers	15	.2
Other	115	1.4
Total	8420	99.8

Source: Highly Qualified Manpower Survey, Statistics Canada, 1973, Table 41.

TABLE 10d

CIVIL ENGINEERS AGE 40+ AND WITH A DEGREE,
BY OCCUPATION AT AGE 30, CANADA, 1973

Occupations at Age 30	Number	Percent
Civil engineers	4685	72.8
No occupation	525	8.1
Commissioned officers, armed forces	195	3.0
Other occ. in natural sci., eng., and math.	140	2.1
Mechanical engineers	130	2.0
Other architects and engineers	130	2.0
Other technical and service sales	65	1.0
Electrical engineers	65	1.0
Process., machin. fabrication	40	.6
Construction trades	40	.6
Industrial engineers	40	.6
Other clerical occupations	35	.5
University teachers	30	.5
Government administrators	30	.5
Occ. related to mgt. and administration	30	.5
Primary occupations	25	.4
Other sales occupations	25	.4
Other mgt. and administration	20	.3
Not stated	20	.3
Agriculturists and related scientists	15	.2
Other	150	2.3
Total	6435	99.7

Source: Highly Qualified Manpower Survey, Statistics Canada, 1973, Table 41.

TABLE 10e

ELECTRICAL ENGINEERS AGE 40+ AND WITH A DEGREE, BY OCCUPATION AT AGE 30, CANADA, 1973

Occupation at Age 30	Number	Percent
Electrical engineers	3045	72.1
No occupation	315	7.5
Commissioned officers, armed forces	140	3.3
Construction trades occupations	65	1.5
Other technical and service sales	60	1.4
Mechanical engineers	60	1.4
Other architects and engineers	50	1.2
Civil engineers	50	1.2
Other occupations	50	1.2
Industrial engineers	45	1.1
Process., machinery, fabrication	35	.8
Other occ. in natural sci., eng. and math.	35	.8
Not stated	35	.8
Architects and engineer technologists	30	.7
University teachers	30	.7
Other clerical occupations	25	.6
Occ. related to management and administration	25	.6
Government administrator	10	.2
Other managers and administrators	10	.2
Accountants, auditors and other financial off.	10	.2
Other	95	2.3
Total	4220	99.8

Source: Highly Qualified Manpower Survey, Statistics Canada, 1973, Table 41.

TABLE 10f

INDUSTRIAL ENGINEERS AGE 40+ AND WITH A DEGREE, BY OCCUPATION AT AGE 30, CANADA, 1973

Occupation at Age 30	Number	Percent
Industrial engineers	665	36.0
Mechanical engineers	210	11.2
Other architects and engineers	145	7.8
No occupation	105	5.6
Occupation related to mgt. and admin.	100	5.4
Electrical engineers	95	5.1
Civil engineers	85	5.0
Accountants, auditors and other financial off.	70	3.7
Commissioned officers, armed forces	65	3.5
Commercial travellers	35	1.9
Process., machinery, fabrication	30	1.9
Other technical and service sales	30	1.9
Other occ. in natural sci., eng. and math.	30	1.9
Construction trades occupations	20	1.6
Other occupations	20	1.6
Other managers and administrators	15	1.1
Chemists	15	1.1
Admin. in teaching and related fields	10	.5
Geologists	10	.5
Agriculture and related scientists	10	.5
Other	5	.3
Total	1870	98.1

Source: Highly Qualified Manpower Survey, Statistics Canada, 1973, Table 41.

TABLE 10g

MECHANICAL ENGINEERS AGE 40+ AND WITH A DEGREE, BY OCCUPATION AT AGE 30, CANADA, 1973

Occupation at Age 30	Number	Percent
Mechanical engineers	1940	58.4
No occupation	255	7.7
Civil engineers	130	3.9
Other technical and service sales	125	3.8
Other architects and engineers	120	3.6
Electrical engineers	95	2.9
Process., machinery, fabrication	95	2.8
Industrial engineers	85	2.6
Other occ. in natural sci., eng. and math.	60	1.8
Commissioned officers, armed forces	50	1.5
Occ. related to mgt. and admin.	45	1.4
Other occupations	45	1.4
Construction trades	40	1.2
Commercial travellers	30	.9
Other armed forces and police officers	20	.6
Other clerical occupations	15	.5
Supervisors: sale occupations	15	.5
Post secondary school teachers	10	.3
Architects and engineer technologists	10	.3
University teachers	10	.3
Other	130	4.0
Total	3325	100.4

Source: Highly Qualified Manpower Survey, Statistics Canada, 1973, Table 41.

Summary of Descriptive Picture

The professions are a large and growing component of our total labour force, and within the professions the number of salaried professionals has been increasing relative to the self-employed component of these occupations. Currently, over 90 per cent of accountants, and engineers, over 60 per cent of architects, and almost 50 per cent of lawyers practice their professions in a salaried context.

In contrast to the usual situation where most professionals are employed in the public sector, in the four professions under analysis, most are employed in the private sector. Their employment income is substantial when compared to that of other workers and even of other professionals. However, they have lost the extremely favourable relative income position they had in the 1930's and 1940's, and their income is substantially less than that of their high income self-employed counterparts.

All four of these professions are predominantly male, with earnings being considerably higher for males than females, even for those who work full-time all year. The vast majority of the four professions are also in the peak income-earning years of their careers, and they tend to come from within the ranks of their own profession rather than from other occupations or professions. This suggests the potential for an insular preoccupation with the interests of their own profession... a behaviour that is not conducive to self-government since the public interest may well be sacrificed for self-interest.

III OCCUPATIONAL SELF GOVERNMENT

The issue of professional self-government is integral to an analysis of the situation of the employed professional in that it explicitly raises the question of what techniques of vocational regulation are appropriate for such persons. In this section we seek to establish that while self-government may be acceptable for self-employed professionals it is undesirable in the case of salaried professionals. It is unnecessary because employers are compelled to consider the public interest, and where they are not, alternative policies can be established to make them do so. At most, the limited use of the reserve-of-title certification may be justifiable. The disadvantages of complete self-government simply outweigh its benefits, especially when the interests of salaried professionals can be adequately accommodated through collective bargaining.

Rationale for Self Government of Self-Employed Professionals

In theory, at least, the underlying premise for occupational self-government is that it is justified only when it is in the public interest to grant such powers.[14] The interests of the particular self-governing occupation are distinctly subservient to the overall public interest: they merit consideration only insofar as they are consistent with the public interest. While generally thought to refer to the protection of the public health and safety,[15] it is also true that the public interest may be broadly defined to include the interests of the particular occupation.

Schemes of occupational self-regulation or licensure are appropriate when the services rendered and tasks performed by a particular occupational group are sufficiently specialized and

complex that members of the lay public could neither perform them themselves nor accurately assess their quality when rendered by someone else. In those circumstances, and most particularly if the costs of error are potentially high such that serious harm would be occasioned to the public in the event of deficient performance, occupational self-government could be warranted.[16]

Historically these premises, upon which occupational self-government have been justified, were seen to be satisfied in the case of the traditional, prototype professions such as law or medicine. Predominantly, the members of these disciplines rendered their professional services in the context of an autonomous, independent, private practice into which individual members of the public would have occasion to enter on only the most sporadic and occasional basis. In these circumstances, the professionals' complete independence and unfettered autonomy usually connoted a resulting ability to control completely their working environment and to dominate their client relationships. Accordingly, in the absence of any other readily available means of administrative supervision, professional self-regulation could property be regarded as a legitimate, if not entirely satisfactory means of safeguarding the public interest.

Under the auspices of the professional association, some standardization in competence of the profession and in the quality of services could be assured to the public. Admissions standards, educational requirements, codes of ethics, and delineations of exclusive work jurisdiction could all be advanced -- notwithstanding the possibility of self-interest -- as legitimate devices by which the interests of the lay client could be safeguarded. These devices were seen as techniques to minimize, if not pre-empt, the possible

abuses which could be practised in a relationship, the irreducible character of which was the predominance of the professional in the professional-client relationship. In this archetypal environment of autonomous, independent practitioners, occupational self-government can be supported as a method to regulate and control an occupational activity in a manner which is consistent with the public interest.

Inapplicability of Self-Regulation of Salaried Professionals

While there may be an "uneasy case for self-regulation" in the situation where self-employed professionals sell their services directly to the public, the premises supporting that conclusion are simply inapplicable to the circumstances of employed professionals. In this context, the employer -- be it a private sector firm, a public sector institution, or even a professional firm -- can be expected to possess the requisite knowledge concerning the required quantity and quality of professional services and the price it should pay. If it does not possess the information internally, it has the resources and incentive to acquire the information.[17] Implicit in an employer's powers of hiring, promotion, supervision and discipline is the not unreasonable expectation that it will be able to safeguard adequately its own best interests, and to ensure that its professional employees, like any of its other workers, adhere to and maintain whatever standards of quality and competence the organization requires.[18] The hierarchical system of controls and supervisory authority that lies at the root of the employment relationship serves exactly the same function as the role of the professional society in safeguarding the public interest. Moreover, unlike the professional society, whose self-interest may colour its role as

defender of the public interest, the employer can generally be expected to have a more immediate and compelling incentive to monitor effectively both his professional needs and the quality of the services that he eventually receives. In fact, it has already been observed[19] that even in the absence of licensing legislation, employers of various professional and scientific disciplines, such as paramedical personnel, will privately construct and administer their own schemes of occupational accreditation with various educational and admissions criteria, when it is in their interest to do so.

Indeed, it would appear from recent studies undertaken in Quebec that whenever a large proportion of their members are employed as salaried professionals in corporate institutions and governmental agencies, the professional associations themselves have recognized the redundancy of their own efforts and the difficulties that they will encounter in any attempt to monitor and regulate the practice of those members.[20] Thus, in summarizing its findings of interviews conducted with various employers, unions and professional societies, L'Office des Professions du Quebec has reported:

> "Employers, unions, and even corporations [the term used to denote the governing professional body in Quebec] believe that, when most of the members of a corporation are salaried employees of companies, organizations or institutions it is difficult for that corporation to exercise its control over the practice of its members. In general, the employers interviewed consider that the existing quality controls in companies, organizations or institutions are perfectly adequate to ensure the protection of the public. They also mentioned that they themselves ensure the continuing education of their professional personnel and that this meets their requirements. As for the unions, some consider the controls exercised by corporations whose members are for the most part employed by companies, organizations or institutions to be useless and quite unnecessary. In practice,

> unions and employers stated that they have little contact with the corporations. The unions in particular consider that in any structured working environment the professional acts of a salaried employee are always the responsibility of his employer who, accordingly, becomes responsible for the protection of the public.
>
> In this sense, several corporation representatives during their interview explained the inactivity of their corporation by the fact that possible action by them would merely duplicate that of other responsible organizations such as the Government, universities, employers and the courts which assume the major responsibility for client information, continuing education formulating standards of practice and discipline."[21]

Employer's Professional Employment Decisions and the Public Interest

Even if employers can be expected to be adequately informed users of professionals, the question remains whether their employment decisions, with respect to salaried professionals, can be expected to be consistent with the public interest. In other words, if professional self-government is replaced by the employment decisions of employers, are there mechanisms which can adequately ensure that the public interest is effectively secured in these decisions? Answers to these questions depend, in part, upon whether the employer operates in the private market sector, the non-market sector, or if the employer is a professional firm selling professional services directly to the public. Each of these cases will be examined in turn.

If the employer is in the market sector then the forces of competition should ensure that the employer makes optimal decisions with respect to the utilization of its salaried professionals. The public need not be informed of the worth of the professional input -- nor any other input for that matter. The public simply buys or does

not buy the final output, leaving the complicated input decisions up to the firm. If the forces of competition do not prevail then the correct policy response is one of competition policy: granting self-government to salaried professionals simply would compound the problem.

If the employer is in the non-market sector (e.g. government, not-for-profit institution or regulated utility) it may not face the same competitive pressures. Nevertheless, even in this sector, employers will be under some constraints to act in the public interest with respect to their decision to employ professionals. Governments are ultimately beholden to taxpayer who vote; not-for-profit institutions are under budgetary constraints; and regulated utilities are scrutinized in rate hearings. Although the public may not be able to exert its influence as directly as it can in the market economy, these mechanisms should ensure that its interest will be felt. Hence there is pressure for employers in the non-market sector to utilize their professional inputs in a fashion that reflects the public interest. If the public interest is not adequately felt, then again this is part of a larger problem of ensuring that the non-market sector is responsive to public needs: granting self-governing power to salaried professionals would not guarantee that responsiveness. In fact, it would only compound the problem by dissipating responsibility.

If the employer is a professional firm, whether it sells its services in the market or non-market economy or both, it will also be under pressure to utilize its professional employees in a manner that is consistent with the public interest. If it sells its services to other firms or institutions, then they can be expected

to be reasonably sophisticated purchasers of that service. Even if the professional firm sells its services directly to an uninformed public it would have an incentive to act in the public interest in order to safeguard its "brand name". The client may not be able to judge the quality of the professional input that it purchases, but it does know the success or failure of these services, and these successes and failures have a direct impact on the reputation of the professional firm.

This suggests that competition between professional firms and self-employed professionals should serve the public interest, with the more efficient way of organizing professional delivery systems growing at the expense of alternative methods. This requires, of course, that the professional firms be allowed to compete and to utilize their professional and other inputs without restrictions from professional societies.

Alternative Policies to Protect The Public Interest

Concern may arise over the possibility that since professional employees must defer to the dictates of their employer or risk losing their job, decisions may be made in the interest of the enterprise which may compromise professional standards and thereby jeopardize the safety and welfare of the public.

This suggestion makes the assumption, erroneously in our view, that the profession itself will be more sensitive to the public well-being than would the employer. In fact, we would suggest that precisely the opposite assumption is more likely to reflect the realities of the respective postures struct by professional societies and employers. Unlike the professional society, which

by legislation is sheltered from competitive forces, the constraints of the market are more likely to induce the employer to act in the public's best interest. Moreover, where these market forces cannot be expected to influence the employer's decision-making, systems of public inspection, standards legislation, public codes of ethics for salaried employees and schemes of civil liability and consumer protection legislation properly applied can[22] be expected to safeguard the public's safety and security. Their applicability in the context of salaried professionals more so than for self-employed professionals comes about because the costs of utilizing these techniques is more feasible with respect to salaried professionals.

Indeed, a system utilizing publicly employed experts who could inspect and assess the procedures by which skilled services are rendered, projects are built and products manufactured, is one which has recently received a positive endorsement from another Task Force as being a viable alternative to the compulsory certification of skilled trades in Ontario.[23] In our view, such a scheme is equally relevant to the situation of the employed professional. As a general bias we have more confidence in such schemes of public regulation which, unlike systems of self-regulation, are not as susceptible to being diverted to one's own self-interest. In short, the element of self-interest, which is implicit in the establishment of professional standards and codes of ethics, argues strongly against such a mechanism to safeguard the public interest when alternative and as effective devices are available for that purpose.

Other Disadvantages of Self-Government in the Employment Context

Not only is self-government unnecessary in the context of

salaried professionals, but is also suffers from chronic disabilities that make it undesirable as a policy choice. These disadvantages stem from the results of restricted competition, the loss of credibility of the professional association, and the possible debasement of the value of the licence itself.

Restricting competition through the control of entry results in artificially high salaries for the profession and hence higher costs to the consumer, even if that cost may be hidden because it is paid out of public funds through the tax system.[24] In addition, occupational mobility is reduced for those who are excluded from the profession, and the danger is raised that such exclusions may involve discrimination or nepotism or other factors not related to ability.

The credibility of the professional association itself may also be weakened if it maintains self-governing powers for its salaried members. Such powers may be interpreted as self-serving and the desire to maintain them would weaken the already uneasy case for self-government for its self-employed members. Since professional organizations are already under public scrutiny, they would do well to divest themselves of any powers that are not entirely consistent with the public interest.

Debasement of the licence or certificate may also occur to the extent that professional associations try to maintain self-governing powers for its salaried members. We have already noted how professional associations have used admission standards, educational requirements, and codes of professional behaviour to ensure some minimum uniform standard of competence of the practitioners and, derivatively, the quality of service rendered. From this perspective the imprimatur that is bestowed by a professional self-governing society

in its grant of a licence to practice, is intended as a representation to the public that its holders possess some basic level of skill, ability and qualifications.

In the absence of any formal system by which the continuing skills and qualifications of the members of a self-governing profession can be tested and updated, the value of the profession's licence will be diluted over time. In any vocation, the relentless expansion of knowledge, refinement of technique and development of skills forming the base of its discipline and expertise will erode and undermine the relevance and validity of the original certification.

This dilemma which confronts any regulatory agency charged with supervising and ratifying the competence and qualifications of its practitioners, is compounded in the case of a profession whose membership includes persons whose services are rendered exclusively in a single employment relationship. Because of the increasing specialization and division of work activities in the labour market, it is even less likely that the professional employee whose services are utilized exclusively by a single employer can maintain the qualifications and expertise that are represented by the licence. By restricting the practice of his profession to a unique employment context, the employed professional may be denied the opportunity to maintain his qualifications in the full range of skills embraced by the profession.

While not crucial so long as the professional remains in the employ of that enterprise, to allow such persons to retain their certification if they begin to offer their services directly to the public is misleading and potentially injurious to the public interest. From a policy perspective, this calls for a re-testing of professionals

who move from salaried employment to self-employment. Only then will the professional certification retain its meaning.

To require all persons who are desirous of practising any aspect of work falling within the exclusive jurisdiction of the profession, to attain some minimum level of competence in all aspects of that profession would also impose considerable expenditures on employer and employee alike. In such circumstances, where the work of an occupation can be broken down into a wide variety of specialized tasks performed in unique and disparate working environments, considerations of efficiency would dictate that the educational and training functions should be tailored to the particular ambition and needs of employee and employer alike. To do otherwise, and require persons to become certified in all aspects of work falling within the jurisdiction of the profession, regardless of their employment situation, is a socially inefficient allocation of human resources.

While such expenditures may have been warranted in the context of a trade or profession whose members were by and large, autonomous, independent practitioners, in the context of the employment relationship more effective and efficient techniques to ensure the competence of professional employees are available. In fact, it was precisely this argument which persuaded the legislators to abandon any schemes of compulsory certification of skilled trades in the manufacturing and general industry sectors where wide variations in the nature and type of work performed by members of those trades was found to exist.[25]

The conclusion that we would draw from the preceding analysis should be obvious. Schemes of vocational licensure or occupational self-government cannot be supported as furthering the public interest

in those circumstances when the members of the profession are employed in a formal hierarchical employment relationship. In that context, occupational self-government is wholly redundant, generally ineffective and destined to prove inefficient and wasteful in the allocation of human resources.

Exclusive-Right-to-Practice Licence Versus Reserve-of-Title Certificate

The argument against self-government for salaried professionals applies most strongly when it involves granting exclusive right-to practice licences since this is the device that most effectively excludes competition, and, in the employment context, restricts the use of alternative inputs for that particular job. Employers may be able to redesign the job or utilize different productive processes, but this can be a costly and inefficient way of bypassing exclusive right-to-practice licencing regimes.

When salaried employees are granted only the reserve-of-title certification by their professional association then competition is not as restricted and the use of alternative inputs is possible. However, while the reserve-of-title may provide considerable information to an unsophisticated client dealing with a private practitioner, it would be of limited use in the employment context, since employers can be expected to be much better informed in their decisions to hire professionals. Even here, however, it may have some information value, especially to small employers or for salaried professionals who have direct dealings with the public. In the latter circumstances the public may feel more confident of the services knowing not only the reputation of the firm or institution, but also

that the firm employs professionals with certain recognizable credentials. This would be the case especially in the non-market sector because the absence of the ultimate market test may mean that there is less incentive for the institution to monitor the quality of service of its professional staff. To the extent that salaried professionals in the four professions under analysis tend to work in the market sector, or when in the non-market sector they tend to deal with people who can adequately judge their competence, then the reserve-of-title certification has little merit.

Moreover, reserve-of-title certification carries with it certain disadvantages even in the employment context. First, it can lead to "credentialism" and a factionalization of the workforce based on titled. Second, a reserve-of-title is usually the first step towards obtaining the more restrictive exclusive-right-to-practice. Once a powerful interest group is created, political realities are such that it may be able to gather even more power. To the extent that policy makers sanction the reserve-of-title designation they may be encouraging the proliferation of exclusive-right-to-practice, with all of its more serious adverse consequences when professionals are employed on a salary basis. The third disadvantage of the reserve-of-title certification in the employment content is that salaried professionals may bargain to turn it into a de facto exclusive-right-to-practice credential by having the employer agree that only those with the professionally designated title can do certain jobs. Obviously, they could bargain for this even without the professional certification; however, the imprimatur of a reserve-of-title facilitates their being able to exert more complete occupational control.

From the perspective of public policy, as is so often the case, a trade-off is involved. The key question is whether the social benefits of the information value of the reserve-of-title, outweigh its social costs in terms of "credentialism" and the possiblity that it may lead to more restrictive practices.

The stance taken by the L'Office des Professions du Quebec appears to be one that recognizes the inapplicability of exclusive-rights-to-practice for salaried professionals, but regards the reserve-of-title as acceptable but not necessary to protect the public interest. As stated by Dussault and Borgeat: "A reserve-of-title is sufficient [but they do not state it as necessary] to ensure the protection of the public in the case of professionals who work mostly in an organized situation".[26]

To the extent that it is feasible, a flexible approach may be warranted in the granting of reserve-of-title to professionals who work mainly in an employment context. If they tend to work for smaller firms, or if they are in the non-market sector, or if they deal directly with the public, the information value of the reserve-of-title may warrant its utilization. However, as tends to be the case of salaried accountants, architects, engineers and lawyers, if they work for large, well-informed employers or if they tend to deal mainly with fellow professionals then even the reserve-of-title as given by the professional association would not be warranted. All that may be necessary in such circumstances is the application of the existing laws against misrepresentation to ensure the authenticity of the professionals' qualifications.

Interests of the Salaried Professional

We have argued that, for salaried professionals in an employment context, there is no justification for an exclusive-right-to-practice licence, and at most an equivocal case for the limited use of the reserve-of-title certification. This conclusion is based on the premise that the granting of such powers is justified only when it serves the public interest. However, in all such decisions, as we earlier noted, the interests of employees, themselves, must also be considered and may in fact properly be regarded as one distinct aspect of the public interest.

We have argued that incumbent professional employees themselves would gain from the barriers-to-entry created by restrictive admissions policies, rigorous educational requirements and regulations limiting the right-to-practice. Their gain, however, would come at the expense of the public interest as it reflects the concerns of consumers, taxpayers, and other workers including those who could otherwise do the tasks reserved for the salaried professionals. In our opinion the gains to the salaried professionals are far outweighed by the losses to the general public even if those losses are subtle and may be dispersed over a large populace.

In addition, however, there are adverse consequences for employed professionals themselves that can occur when self-regulation is extended to an environment that is alien to its methods of occupational control. New entrants into the profession may be compelled to meet a variety of requirements that are unnecessary for their objectives in an employment environment. The employability of the professionals themselves may be jeopardized if employers are required to accept a host of unnecessary and rigid constraining

influences on how they utilize their professional workforce.[27] In addition, the privileges granted to professionals may create discord in the rest of the workforce, and this may be considered by employers in their decision to hire professionals.

Most important, professionals in the employment environment may be subject to severe conflicts if they are compelled to adhere to professional licencing requirements that were designed with the self-employed and not salaried professional in mind. This could occur, for example, with respect to provisions in professional codes of ethics involving such matters as jurisdictional issues with paraprofessionals and other professionals, the right to engage in collective work stoppages, the obligation to the "client" of the salaried professional, or the right of a disciplinary committee to have access to company records. In essence, the interests of salaried professionals themselves can be jeopardized by the potential conflict that may occur if licencing requirements are extended to the employment environment. These issues, and how they are accommodated in the collective bargaining process are discussed in more detail in the section "Scope of Bargaining: Professional Status" in Chapter V.

IV COLLECTIVE BARGAINING BY EMPLOYED PROFESSIONALS

Our previous conclusion as to the inappropriateness of self-regulation for salaried professionals is reinforced by the fact that alternative means do exist which are capable of safeguarding their legitimate employment concerns. They have an individual bargaining power that usually surpasses that of most workers, and where that fails, they can engage in collective bargaining.

That professionals at all levels can engage in collective bargaining is illustrated by a variety of examples. In the Canadian federal Public Service, most professionals, including accountants, architects, engineers and lawyers, are included in one of the bargaining units subsumed under the Professional and Scientific Occupational category, and they do in fact bargain with the Treasury Board under the Public Service Staff Relations Act. In other countries, like Sweden, where collective bargaining goes on at the national level, professionals are well represented in their separate professional unions: even the self-employed are members because national agreements have an impact on their work environment. The paradigm professions of medicine and law also engage in collective bargaining when they bargain with the government over fee schedules for medicare and legal aid, or when residents or interns bargain over their working conditions.

Reasons for Collective Bargaining Response

Clearly, collective bargaining by employed professionals is an established fact. In many cases such a response can result from peculiar situations relevant to a particular employment context. Nevertheless, it is also clear that the collective bargaining

response can also emanate from conditions that tend to be prevalent for employed professionals in general.

In that regard, professional employees, who render their services exclusively in the context of a formal employment relationship, as a group face a fundamental, irreducible tension which serves to distinguish them from their counterparts in private practice. The source of this tension lies in the segregation of professional responsibility from supervisory or monitorial authority. The manifestation of that tension is revealed in the conflicting allegiances that are owed by professional employees to their own professional standards, ethical norms, goals, and beliefs and to their employer's instructions. In short, it is the employed professionals' inability to retain a large measure of control over their working environment which serves to differentiate them from the private practitioner and which has been seen to threaten their very professional status. As one observer has noted, the employed professionals, unlike their self-employed colleagues, must serve the community through an organization which will synthesize and co-ordinate all of the professional and non professional efforts that are required.[28]

The extent of the control to which an employed professional may be subjected can be absolute. In many employment relationships, the employer may retain complete authority to delineate both the nature of the work that professionals may perform as well as the circumstances under which those services will be rendered. Faced with such institutional constraints, their inability to realize their own professional goals has profound implications for their "professional standing". In such circumstances, a variety of

institutional constraints may, from the employee's perspective at least, be seen to threaten their "professional standing". For example, the institutional impediments to maintaining and upgrading one's professional competence, the persistent compartmentalization of traditional professional functions, and the fundamental inability to insist upon the conditions under which and the standards against which their professional services are judged, all are perceived by professional employees as being inconsistent with the traditional notions of professionalism.

Precisely how vulnerable the situation of the employed professional actually may become, was recently and rather dramatically revealed in the case of a teaching master in a community college who was dismissed from his employment for refusing to accept a new teaching assignment from his superior. His reasons for doing so were founded on what he regarded to be his lack of professional competence and expertise in the area. He claimed that to accept such an assignment would compromise the professional academic standards of both the college and himself, thereby jeopardizing the students' (clients') interests. In the context of a grievance against what was alleged to be an unjust and improper termination, the arbitrator ruled that while the master could properly raise or indeed challenge the propriety of the assignment, in the final analysis he simply had no authority to ignore it and to make his own "decision unilaterally, except... where a sense of professional responsibility might prompt him to resign". For his failure to defer to his employer's judgment, it was held the latter had just and reasonable

cause to terminate him from his employment.

In assessing the consequences that flow from the fact that

employed professionals are unable to control their working environment, it is important to underscore the fact that this is not an issue peculiar to the professional employee. Except in unique and well-defined circumstances (when, for example, issues of the employee's own safety and health may arise), it is universally recognized at all levels of the employment relationship that an employee may only, at his peril, refuse to comply with the orders of his employer.[30] More generally, it is recognized that most workers share the desire of professional employees to perform some socially useful service, to decide how their talents are to be exercised, and to preserve some occupational identity and integrity. Rather than being unique to professional occupations, such goals manifest a common desire on the part of all employees to retain the maximum control in the direction and content of this central aspect of their lives.[31]

Indeed, it is that same sense of dissatisfaction that has generated much of the present debate on the desirability of enhancing the quality of working life generally by means of job enrichment schemes, and by the democratization of the work place.[32] In that sense, issues of technological change in the Post Office or work-sharing on an automobile assembly line are directly analogous to the erosion and subversion of professional skills that are experienced by a wide variety of professional groups.

While not unique to the professional employee, problems of self-actualization, career development, autonomy, and occupational integrity may be more immediate and profound issues for professional employees because of their greater educational qualifications, more intense work orientation, and higher career aspirations. Thus, as

Kleingartner has written:

> "It was suggested that individual satisfaction and career development, autonomy, occupational integrity and identification, and economic security and enhancement are the major work-related values of professionalism. These values are not unique to any occupation or category of occupations. In a very real sense they are nothing more than what all workers seek to achieve from their work careers. Yet, we can distinguish professionals from non-professionals in this regard, in terms of the level at which they expect these values to be realized and the importance attached to them. For example, by the very nature of their work, autonomy will be valued more highly by professionals than by most non-professionals."[33]

The characteristics of professionals tend to create conflict situations especially when they are employed in large bureaucratic organizations with their emphasis on seniority, rigid work schedules, formal salary structures and hierarchical decision-making. Employed professionals often find themselves treated much like production and other white-collar workers. Consequently, they have increasingly turned toward emulating the successful unionization response of such workers.

Historically, unionization can be viewed as a response to the job insecurity associated with the development of a market economy, and as a response to the whims of managerial decisions associated with hierarchical control. As employed professionals find themselves in a position of job insecurity and subject to managerial directives, they too have increasingly turned toward a unionization response.

This is especially the case when salaried professionals have no organized power base from which to operate, as may be the case if their professional association is dominated by self-employed professionals. This is reinforced by the success of other competing

interest groups -- blue and white collar unions, community groups, consumers' and employers' associations -- who often have successfully presented a united front. In such circumstances often the only way to be heard is through collective action.

As well, resort to collective action by professionals has been facilitated by the fact that in general the lofty image of "professionalism" no longer prevails. Their social and economic position has been diluted by the increased education and training of the whole workforce, as well as by the large influx of persons into the existing professions and the proliferation of a variety of new professions and quasi-professions. In addition, especially amongst younger professionals, militant, collective action may no longer be regarded as conflicting with notions of professionalism. Consequently, professional groups are more willing to engage in unionization, strikes, and picketing... especially if they can be labelled associations, mass resignations and public information campaigns. Clearly, when treated like other employees, salaried professionals have been willing to emulate their collective response.

The observation that the plight of the employed professional is not unique to persons who have attained given educational levels or employment strata is an important one. It suggests that the collective bargaining procedures successfully invoked by employees in industry over the past thirty years to further their own self-interests are adaptable and amenable for use by professional employees as well. The attractiveness of collective bargaining is heightened when it is compared to self-government as a device for the representation of the interests of salaried professionals.

Collective Bargaining Versus Self-Regulation for Salaried Professionals

As a basic hypothesis, we will advance the proposition that, as techniques of job control, occupational self-government and collective bargaining are uniquely suited to distinct and particular forms of economic organization. In our view, self-regulation is especially suited to the circumstances of persons who practice their vocations privately and independently, while collective bargaining evolved to address the aspirations and ambitions of the salaried, employed workforce. It is our contention that the critical distinction between independent practice and salaried employment strongly argues for unique procedures to be struck through which each sector can secure and maintain their legitimate aspirations in a manner which is consistent with the public interest.

That occupational self-regulation and collective bargaining are simply parallel instruments designed to address and advance the interests of distinct and disparate sectors of the workforce is revealed in the basic techniques of occupational control that are synonymous with each scheme. The classic tools utilized by virtually all professional self-regulating associations to maintain the professional and economic integrity of their members correspond to the economic organization of that membership. Reflecting the predominance of the private practitioner in most professions, these devices primarily are directed to regulating the relationships between the members of the profession and their clients. For example, admissions criteria, educational requirements, definitions of unprofessional conduct, all are directed toward the relations that exist between members of the profession and between members of

the profession and the client. None of these devices of occupational control take account of the fact that some third party may intervene between the profession and the public. These tools were designed without reference to the employment context and were intended to remedy deficiencies and abuses alien to that environment.[34] As others have observed[35] and as experience has revealed these traditional techniques of occupational control have proven to be singularly ineffective in responding to the concerns and needs of the employed professional.

By way of contrast, collective bargaining is a bilateral, adversarial device which inherently recognizes, and indeed is premised upon, the existence of an employer whose organizational constraints and operational requirements may not wholly coincide with the occupational ambitions of the employees. It is a method by which employees, whether professional or otherwise, together with their employer can fashion agreements to accommodate their often competing interests. For example, collective agreements can and in fact do contain provisions which simultaneously assure the employer that its staff will possess and maintain levels of skills and qualifications that are commensurate with its needs, while offering to the employees opportunities to develop and further their own occupational potential. Thus, provisions can be drafted which stipulate basic entry-level qualifications for certain jobs, or job training for others, which guarantee attendance at educational conferences and vocational seminars, and which secure the right to paid educational leave.[36] Such negotiated provisions can reconcile, within the context of a particular employment setting, the operational needs of the employer with the vocational aspirations of the staff. Moreover,

rather than imposing uniform educational or vocational requirements, with their attendant costs, such agreements permit the parties to determine the level of training, education and skill that is consistent with the productive requirements of the enterprise and the occupational ambitions of the staff.

In contrast, then, with the emphasis placed by self-governing professions on uniformity and universality in their efforts of occupational control, collective bargaining responds to a more heterogeneous environment, permits flexibility and encourages pluralistic solutions. It induces each employee group to direct its energies to securing whatever guarantees are thought to be most crucial to its specific occupational goals within the constraints of a particular employment relationship. In that sense, determining the extent to which professional employees may retain ultimate authority as to the means by which they render their services can be regarded as a bilateral exercise in which spheres of responsibility are allocated to the employees, the employer or some joint agency. While necessarily lacking the unilateral character of directives and regulations issued by self-governing societies, collective bargaining nevertheless does foster and direct a meaningful participation by employees in the design and administration of their work environment. Moreover, it does so in a way that enhances the efficient allocation of human resources by requiring the manifestos of occupational control to be negotiated within the context of the institutional constraints and productive requirements of particular organizational settings. As these constraints and requirements differ across sectors and over time, so may the degrees of occupational control.

In its facility to accommodate and reconcile the often competing

interests of employers and employees, we have identified one of the more fundamental advantages collective bargaining offers over self-regulation as a system of occupational regulation. In effect, in the legal obligation requiring the parties to bargain collectively in good faith and make every reasonable effort to effect a collective agreement,[37] collective bargaining is more likely to ensure that the public interest will be fairly represented and considered in the terms which are settled to regulate that occupation. This is to say, in the legal duty to bargain, there is a confrontation and accommodation between the public interest, as that is represented in the employer's concern to remain competitive, and the private interest as it is revealed in the employee's professional aspirations. It is in such a forum, where these competing interests are made to confront and defer to the legitimate and essential interests of each other, that such issues as admissions policies, educational requirements and work jurisdiction are resolved. Collective bargaining, in short, ensures that the occupational self-interest to monopolize and preserve the value of a property interest in an occupation, is set against the equally compelling determination of the public to utilize resources and acquire services in the most efficient manner. Collective bargaining ensures, then, that a check is provided against each of these powerful interests. In sharp contrast, schemes of self-regulation assume that fair and appropriate resolutions of these competing interests can be made unilaterally, or with only the most modest superv-sion, by one of the interested parties.

To be sure, in the collective bargaining process, there may be times when the public interest is not adequately represented in bi-

lateral negotiations between employees and employers. As we have earlier noted, the potential for this neglect is greatest in the public sector where market constraints may not put adequate pressure on the parties to settle. Yet this is a more general phenomenon which applies not only to salaried professionals, and for which new mechanisms of dispute resolution are presently being sought. At the very least, we are suggesting that the public interest has more of an opportunity to be considered in bilateral collective bargaining, than in unilateral occupational control through self-government.

Ineffectiveness of Professional Associations

The inappropriateness of self-regulation for salaried professionals is substantiated further by the ineffectiveness, in dealing with the problems of salaried members, of those professional associations whose membership includes a significant segment of self-employed professionals. There is considerable evidence to suggest that these professional, self-governing associations have been unable or unwilling to resolve the frustrations of their members who work in an employment relationship. We have already described the findings of L'Office des Professions du Quebec.[38] Its experience is consistent with views expressed on the engineering profession in Canada that management has, even in the face of statutory enactments delineating exclusive-right-to-practice,[39] generally retained their right to assign work in any manner they see fit.[40]

A variety of factors can be identified to explain the ineffectiveness of the professional associations dealing with the problems of their salaried members.[41] Briefly summarized and in addition to the organizational deficiencies already discussed, it has been suggested

that the employer (managerial) and private practitioner orientation of the professional associations have inhibited those authorities from addressing the grievances of their employee members. Moreover, even in those circumstances where the salaried employees numerically dominate the self-governing society their accountability to and dependence upon their colleagues who exercise managerial authority at their work place, may well inhibit them from exploiting their numerical superiority to challenge and overcome the latter's control of the decision-making processes of the association.[42] These factors have led one analyst of professional associations to conclude that:

> "There is little evidence that legislative protection in the form of licensure, control over the educational process, codes of ethics, control over standards of practice can have a significant impact in upgrading the status of the salaried professional to anywhere near the level to which they feel they are entitled."[43]

Inappropriateness of Codes of Ethics for Salaried Professionals

The internal dissension between salaried and self-employed members of a professional association is not the only problem that arises when a professional association tries to represent both salaried and self-employed members. We have earlier suggested that the techniques of occupational control traditionally utilized by such agencies may not be appropriate to the circumstances of the employed professional. That observation is borne out when one examines the impact of applying codes of ethics to the situation of the employed professional.

As with virtually every technique of occupational self-regulation, codes of ethics and rules of professional conduct purport to have as

their overriding purpose the safeguarding of the public interest. In addition to the authority to license, these rules and regulations historically provided the primary mechanisms by which the profession itself ensured that its members adhered to certain professional standards and maintained an acceptable level of competence and integrity. As Arthurs states: "Through its code of ethics, the profession attempts to reassure the public that it will abuse neither its authority, nor the monopoly which it enjoys."[44]

Against this rationale, we would, at the outset, question whether such standards would have much relevance to the circumstances of the employed professional. Most codes, with the exception of those governing the Engineering Profession,[45] have as their primary focus the self-employed professional. Indeed, in certain professions, such as Public Accountancy, the rules of professional conduct expressly apply only to those public accountants "practising as such".[46] Moreover, those provisions pertaining to advertising, signs and letterheads, responsibility for client funds, fee arrangements, financial and professional relationships with one's colleagues, jurisdictional issues with paraprofessionals and other professionals, and participation in other commercial ventures -- provisions which are common to, and of the essence of, most professional codes of ethics -- simply have no application to the working lives of most employed professionals.

Against their historical origins, at least in the traditional professions, this observation should not be particularly startling or revealing. At the time they were promulgated, the vast majority of the members of those professions were engaged in independent, autonomous practices.[47] While theoretically appropriate to super-

vising and regulating an occupation structured along such organizational lines, schemes of occupational self-government were not initiated with the situation of the employed professional in mind.

This is most starkly illustrated in the case of jurisdictional disputes. Against the increasing division and compartmentalization of the work processes in the employment context, it is simply not possible to expect that definitive and clear lines depicting the boundaries and jurisdiction of a particular profession can have been drawn in detailed codes both horizontally against other professions and vertically against other skill groups.[48] The confused and unsatisfactory case law of the architects' continuing jurisdictional dispute with the engineers is evidence of the former,[49] while the absence of a single prosecution against an engineering technician or technologist for violating the governing statute corroborates the latter.[50] It assumes, falsely in our view, that managerial directives can be assigned clearly to one or the other side of a predescribed line which demarks the professional from inferior performance. That professional associations have seldon made pronouncements against managerial directives in the jurisdiction area, confirms that such directives are rarely capable of a priori determinations.

Moreover, there is little if any need for such professionally regulated norms of competence and integrity in the employment context. Even if professional self-regulating associations were to enforce rigorously professional standards and codes of ethics, in most, if not all circumstances, such activity would prove to be wholly superfluous. As we have earlier noted, in the employment context, it is generally recognized that the employer can be expected to exercise its ordinary commercial powers of hiring, discipline,

promotion and dismissal to ensure that its professional employees satisfy whatever norms of competence and integrity it decrees as required.[51] There is nothing that such professional discipline can add that could not be taken account of by way of an industrial sanction. Moreover, as we earlier argued, by particularizing the standards of competence and integrity to the circumstances of each individual employer-employee relationship, substantial efficiencies to be achieved in the utilization of human resources.

Apart from being largely superfluous or simply inapplicable to the circumstances of employed professionals, codes of ethics may in certain circumstances actually be prejudicial to their best interests. In fact, the application of a variety of platitudinous provisions contained in codes of ethics may expose the employed professional to a fundamental dilemma -- a veritable Catch 22. When employees are confronted with a choice between their duty to professional standards as opposed to their employer's instructions, they may be disciplined whatever decision they make.

The potential conflict between professional ethics and management demands is starkly portrayed by a series of examples which coincidentally refer to engineers, lawyers and accountants:

> Consider, for example, the plight of an engineer who is told that he will lose his job unless he falsifies his data or conclusions, or unless he approves a product which does not conform to specifications or meet minimum standards. Consider also the dilemma of a corporate attorney who is told, say in the context of an impending tax audit or anti-trust investigation, to draft backdated corporate records concerning events which never took place or to falsify other documents so that adverse legal consequences may be avoided by the corporation, and the predicament of an accountant who is told to falsify his employer's profit-and-loss statement in order to enable the employer to obtain credit.

> The employee also might be forced by threat of discharge not to give testimony unfavourable to the employer, or to give up a lawful claim against the employer, a fellow employee, or some third party, or not to buy goods from or otherwise deal with a particular business concern.[52]

Recognizing that such conflicts are not unique to the situation of the employed professional, our contention is that professional codes of ethics are not well-suited to their resolution. This is particularly true given that other methods, in particular the collective agreement and the grievance procedure, have shown themselves capable of resolving such problems for all workers.

Equally serious is the occasion when the provisions of codes of ethics can interfere with and actually undermine the right of the professional employee to pursue certain actwvities which are integral to meaningful collective bargaining. This circumstance is perhaps best illustrated on the occasion when professional workers engage in a concerted withdrawal of their services. Most labour analysts would find nothing in such activity to be incompatible with what they regard to be the generally accepted meaning of "professionalism".[53] In fact, most professionals included under such legislation as the Public Service Staff Relations Act,[54] the British Columbia Labour Code,[55] and the School Boards and Teachers Collective Negotiations Act,[56] are permitted to strike. Against those benchmarks, to permit professional discipline committees to characterize what would otherwise be regarded as lawful behaviour, as a derogation of one's "professional duty to serve" a clientele would be wholly inappropriate. While none of the four professional codes under scrutiny make specific reference to the inappropriateness of strikes, broad and overreaching commitments to the service ideal may in fact be thought to embrace it. To

characterize such professional behaviour as "unethical" is to ensure that some disciplinary sanction will be meted out by the union or the professional association, however the professional acts. And, in the view of some, there is a real danger that the conflict to which the employee is exposed would be more real than contrived. Thus as Arthurs has noted:

> "If there is some difference of opinion between those that favour and those that oppose collective bargaining within the professional association, and if one faction or the other gains control of the executive machinery of the profession, there is certainly a real risk that the control of the professional association will be used to enhance the ideology of the controlling group in respect to collective bargaining. Let us assume that those that favour collective bargaining get control of the professional association. People who do not practise collective bargaining could be termed guilty of some form of unprofessional conduct in selling their services at less than the collectively bargained rate, and for that reason could be denied the right to practise their profession. Conversely, if those that oppose collective bargaining are in control of the professional association, there is the opposite danger, that they will view collective bargaining as unprofessional conduct, and will put pressure on people to abandon collective bargaining because they have the power to control the practice of the profession."[57]

Indeed, these latter comments support the view that even in those instances when the concerted activity is unlawful, or occurs in what might be regarded as an "essential service", such matters ought to be left to the relevant labour legislation to resolve.[58] Even with respect to an unlawful strike, we simply have no faith in a potential sanction forthcoming from a professional society as being an effective way to regulate such activity. Against the record of lethargy noted earlier,[59] it is simply not realistic to assume that professional associations would sanction their members who engage

in such behaviour. Nor would such a prospect carry any particular or unique deterrent effect which is not implicit in remedies presently available in the relevant labour legislation or in the law of contempt. Indeed, more than being redundant, against the variety of non-punitive, harmonizing sanctions that are made available and commonly utilized under labour legislation, to permit a third party to invoke such punitive professional sanctions could well serve to exacerbate the resolution of the root causes which may give rise to an unlawful strike.

To return to our original point, professional codes of ethics may, in certain broad omnibus provisions, be more than redundant. They may in fact, as we have observed in the context of a concerted withdrawal of services by salaried professionals, create unique difficulties as a reuslt of being applied to circumstances wholly alien to their original intention. At the very least, these difficulties detract from the relative merits of occupational self-government as a method of job control in the employment context. Similarly, in our view, other traditional "professional" issues such as identifying the clients of salaried professionals, or the right of a disciplinary committee to have access to company records or to confidential client information, or the legal basis on which liability can be attached to a private corporation for the violation of Professional Codes,[60] which issues flow from a professional society asserting its jurisdiction over its salaried membership, while not insoluble, are sufficiently obscure as to require unnecessary energies to be expended in their debate and resolution. At worst, these anomalies, which result from the application of codes of professional conduct to the situation of employed professionals,

can expose the latter to such pressures and potential sanctions as to inhibit them from exercising their rights as employees. By way of contrast, if resort is had to collective bargaining as the means of occupation regulation, issues of professional norms and expectations are resolved directly in the terms of the collective agreement where they are relevant to the employment relationship, as in the case of the right to strike. Or, they can simply be ignored, as in the case of fee arrangements, where they are wholly alien to the employment context.

In spite of our reservations with respect to the desireability of professional codes of ethics in the employment context, we recognize that there may be circumstances when it is in their own self-interest and/or the public interest, for the parties themselves or the legislature to extend the relevant parts of such codes of ethics to the employment context. Such codes may enable employees to resist unethical practices and, as well, may serve to inspire public confidence, thereby conferring a benefit on the employer as well. However, to avoid the appearance of elitism, our preference would be to encourage the extension of such <u>public</u> codes to all employee groups, where relevant.

V LEGAL ISSUES: APPROPRIATE BARGAINING SCOPE, UNIT AND AGENT

We have argued that the process of collective bargaining is well-suited to reconcile the interests of salaried professionals with those of employers and the public interest as well. In this section, we seek to establish that the current legal structure, with few changes, can adequately accommodate the position of salaried professionals.

This capacity to accommodate widely divergent occupational ambitions springs from the fact that the central features of the collective bargaining process are so pliable as to be capable of being molded to suite widely disparate employment contexts. Indeed so malleable are the basic features of this process that we are satisfied that the present regime of collective bargaining, through which non-professional employees generally have sought to increase their influence in the design of their working environment, is wholly suited, in its present structural format, to respond to the aspirations of employed professionals. In an era of congested legislatures and mushrooming bureaucracies, a policy alternative which offers the prospect of immediate implementation, without the creation of an attendant bureaucracy, must be considered preferable to those which do not.

Status of Professionals Under Existing Legislation

Our thesis that the existing collective bargaining statutes can accommodate the particular and unique features of "professional" employment is not contradicted by the exlcusion of certain professional groups from the labour relations legislation that is presently in force

in Newfoundland,[61] Nova Scotia,[62] Prince Edward Island,[63] Ontario,[64] and Alberta.[65] In the first place, in light of a recent decision of the Ontario Labour Relations Board,[66] it would appear that the breadth of such exclusions is not as pervasive as some might have thought. In the second place, it is apparent that excluding professional employees from the scope of the labour relations legislation is simply not a response that is uniformly shared in other jurisdictions in this country.[67] Thus, in both British Columbia and Saskatchewan[68] the legislatures have not seen fit to make a single reference to professional employees: they are to be treated in exactly the same manner as any other person who is covered by the legislation.

In fact, this latter response is one which historically has dominated the labour legislation in this country. For example, in the earliest piece of labour relations in Ontario, the Collective Bargaining Act 1943,[69] except for one section limited to the applicability of "union security" clauses to members of a "learned or scientific profession",[70] professional employees were treated in precisely the same fashion as any other employee group. Indeed, it has been noted that during the period that this legislation was in force, two applications for certification for the employees in the City of Toronto were approved which included such professionals as doctors, lawyers, engineers and land surveyors.[71] Moreover, the legislative judgment that professional employees should not be treated any differently from their non-professional colleagues continued to manifest itself in succeeding legislative enactments including the Ontario Labour Relations Board Act (1944)[72] and P.C. 1003 (1944), the latter regulation being the wartime instrument, which superceded

all provincial legislation in the field. Under P.C. 1003, the Canada Wartime Labour Relations Board frequently issued certificates for bargaining units containing a mixture of professional and other employees. In certifying such integrated units, that tribunal was unable to identify:

> "...for the purpose of collective bargaining... any important difference in interest between a professionally qualified engineer and an engineer who has no such professional qualifications, provided both are carrying on work of the same or similar nature and under similar conditions. Academic attainment cannot by itself determine the community of interests."[73]

and observed that:

> "The conditions of employment of the office workers and the professional and technical workers employed by the employer are the same. No good reason has been shown to warrant subdividing this group of employees into separate units."[74]

In the result, it was not until several years later, in 1948, when the Industrial Relations and Disputes Investigation Act[75] was enacted that certain professional groups were first excluded from the legislation. That exclusion has continued to manifest itself, to a greater or lesser degree, in the various provincial enactments noted above.

Even within those jurisdictions which conformed to this latter federal model and excluded certain professional groups from its scope, it is apparent, even from a casual perusal of the legislation, that these exclusions have neither been uniform nor consistent. For example, all jurisdicitons with a professional exclusion, with the exception of Ontario, cite professional engineers in those exclusions. Conversely, none, except Ontario, make any reference to the land-surveying profession.

Moreover, none of these legislative exclusions are pervasive in their reach. Indeed, by restricting their application to a narrow group of traditional professions such as lawyers, physicians, dentists, architects, the implication is that such other generally recognized professional groups as accountants, nurses, and pharmacists as well as the entire spectrum of more recent professional groups such as psychologists, social workers, physiotherapists and optometrists, are intended to have recourse to the provisions of the relevant collective bargaining legislation. Indeed, it would appear to be in direct response to such inconsistency of treatment, that in one recent legislative pronouncement,[76] the legislature of British Columbia held to the view, since abandoned altogether[77] that, in addition to the traditional exceptions, licensed chiropractors, optometrists, naturopathec physicians, veterinarians, podiatrists, real estate and securities salesmen all would be excluded from its terms.

This legislative ambivalence in the treatment of salaried professionals can also be seen even within particular jurisdictions when a comparison is made between the applicable labour relations legislation in the private and public sectors. For example, under the Ontario Labour Relations Act professional engineers are now specifically brought within the scope of the Act: in the analogous public sector legislation, being the Crown Employees Collective Bargaining Act,[78] those persons are excluded from its terms. Similarly, in British Columbia, where the Labour Code presently makes no reference whatsoever to professionals, in the British Columbia Public Service Labour Relations Act[79] except for those qualified under the Legal Professions Act, provision is made in s. 4(b) of that legislation for a comprehensive unit of professional employees who are employed

in the Public Service of that province. By way of contrast, Newfoundland, in its Public Service legislation, would appear not to differentiate between professional and other employees, while in its private sector legislation, it has excluded at least some of the traditional, prototype professions from its terms. And finally, lest one presume that the specific exclusion in the British Columbia public sector legislation of members and students of the legal profession was premised on some universal truth or conventionally held wisdom, reference may be had to ss. 2 and 32(3) of the Public Service Staff Relations Act[81] and to the decision of the Public Service Staff Relations Board in Re Professional Institute of the Public Service of Canada and Treasury Board 142-2-130 for an example of a legislative scheme in which salaried lawyers have been certified in their own bargaining unit.

Such diverse and disparate responses from these various legislatures as to the applicability of collective bargaining legislation to salaried, employed professionals should effectively refute any assumption that there is some a priori, universal, rationale which necessitates the exclusion of particular professional groups from the general labour relations legislation.[82] In the absence of any uniform or consistent response from the legislatures on this issue, an analysis, on first principles not only is more justified, but becomes imperative. Specifically, it is necessary to see how the current legal structure can accommodate salaried professionals.

Scope of Bargaining: Professional Status

We have earlier identified the segregation of professional responsibility and supervisory authority as a root cause of much of the

frustration and malaise that permeates the ranks of the employed professional. In our view, the extent to which employed professionals have been able to bridge the dichotomy to reassert some control over matters of professional standards and norms, suggests that the existing legal structures of collective bargaining are sufficiently adaptable to the needs of the employed professionals. Specifically, in our view the existing obligation enshrined in all labour relations legislation in the private sector, that upon certification an employer must meet with the union and "bargain in good faith and make every reasonable effort to effect a collective agreement"[83] has shown itself to be sufficiently encompassing to respond to the perceived threat to the professional status.

Observation and analysis tend to confirm that at least with respect to issues of professional integrity and standing, positive results can be achieved under collective bargaining. Many of the claims in support of collective bargaining are commonly subsumed under the rubric of the democratization of the work place. As such, they are claims which are valid regardless of the education or professional training of the employee. The relevance of collective bargaining depends upon the economic organization and institutional structure in which one performs, rather than educational honours attained. Thus it is now commonplace to find in the literature the assertion that collective bargaining has enhanced the professional status of persons who are working in a formal employment relationship by securing some measure of independence and self control.[84] Moreover, that assertion is one which has, historically, been borne out by various groups such as the Actors' Guilds, Musicians' Unions, and the Air Line Pilots' and Air Traffic Controllers' Associations, who

consider themselves professionals and who have adopted this decision-making practice to "protect their professional standards of creating accomplishment, which, like those of some skilled tradesmen, were often felt to be at odds with the market orientation of their employers".[85] Many of these groups in fact used unionization as the device whereby they achieved professional recognition: without the union they had little power because they lacked a strong professional association with occupational licensing powers.[86]

We have also earlier observed that it is through the collective bargaining process that various clauses have been negotiated into collective agreements pertaining to continuing education, sabbatical leave, attendance at professional conferences and the like.[87] Teachers in Ontario, since their adoption of collective bargaining, have demonstrated a particular facility for obtaining guarantees from their employers with respect to preparation periods, professional development and sabbatical leave.[88] Similarly, cluases have been negotiated stipulating authorship and publication rights as well as royalty and patent rights for employees who undertake novel and important assignments in the course of their employment.[89]

As with numerous skilled trades groups, salaried professionals can respond to the inexorable fragmentation of their occupational skills, to the incursion from paraprofessionals, technicians and other allied professional groups, and to the perceived depreciation of professional standards by negotiating provisions restricting the employer's otherwise unfettered right to organize and assign the work processes. Provisions in existing collective agreements stipulating fixed teacher-pupil ratios[90] are nascent illustrations of what teaching professionals have been able to achieve in this regard.

Moreover, the spectre of redundancy and obsolesence brought on by the availability of less skilled and less expensive technicians and paraprofessionals, is identical to the equally foreboding technological developments faced by any skilled trade or craft group, such as, for example, the stereotypers in the newspaper trade. In order to enhance their professional responsibility, salaried professionals, as is the case with various engineer groups, may negotiate agreements with their employers to ensure that they are only assigned "work which is appropriate to their professional competence".[91] Similarly, to relieve the tension existing between their employment obligations and their professional responsibilities, agreements can be, and for certain enginering groups have already been, negotiated to ensure that the professionals retain the right to approve their own work and correlatively to withhold their signature in those instances when they determine that the work does not meet with professional norms.[92] In fact, in the Re Seneca College decision referred to earlier, the parties had negotiated a clause, similar in purpose, which prescribed a procedure under which teachers could challenge the propriety of their teaching assignments. Indeed, the present chairman of the Canada Labour Relations Board has specifically called upon all engineer groups to insist upon the principle of the "inviolability of a professional decision" to be incorporated into their negotiated agreements.[93] To that end, some engineering and nursing groups have successfully negotiated for the establishment of professional relations committees whose mandate is to monitor and respond to issues of concern to professional employees as they arise.[94]

The point of these examples is not to argue for their wisdom or to suggest that they exhaustively canvass what can be done to assure the "professional status" of the employed professional. To the contrary, in most of the instances described, given the relative immaturity of the bargaining relationships involved, such provisions represent only modest beginnings. Rather these illustrations underscore the belief that if professional employees feel isolated and frustrated in their professional aspirations because of their inability to control their working environment, there is a mechanism, tested by other trades, vocations, and professional occupations that is capable of responding to their needs. The legal authority to negotiate directly with their employer on such issues of professional concern is well established. The extent to which salaried professionals make use of this device to settle matters of professional concern is within their own competence to determine.

For example, in the case where the services of the employed professional are rendered directly to the public (e.g. social workers, company doctors), such professionals could negotiate provisions which specifically delineate the rights and responsibilities owed by the professional to their clients. Similarly, such issues as the protection of professional standards, the assessment of work quality, and the assignment of professional work to others without the equivalent training, all are matters which fall within the scope of private resolution and within the purview of the traditional collective agreement.

Scope of Bargaining: Issues of Management Rights and Public Policy

Indeed, the duty to bargain, which can properly be seen as the cornerstone of our present system of collective bargaining, is wide enough to accommodate a whole host of policy issues which traditionally have been reserved to the management prerogative. Thus, teacher groups bargaining over class size, content of syllabi, curriculum design, and control of disruptive students,[95] and nursing staff negotiating for methods of regulating the quality and quantity of nursing care, provide illustrations of instances when professional employees as a means of preserving and advancing their professional discipline, have begun to negotiate with their employers both as to the latter's goals and the methods of achieving those goals. In our view, there is nothing, in the private sector at least, which would preclude a group of professional employees from seeking agreement on such issues. All are compatible with the range of issues usually embraced by the duty to bargain in good faith. The fact that non-professional employees have largely avoided such questions in the interest of first establishing some measure of economic security, does not preclude other groups, who may as a result of their professional standing, already possess a degree of economic security, from pressing such matters.

It is true that in the public sector the conventional wisdom holds to the view that collective bargaining is a singularly inappropriate mechanism to resolve such issues of policy and process. In this regard, the view has been expressed that our traditional political processes would be subverted by allowing employees, whether professional or otherwise, to engage in collective negotiations on

issues which necessarily transcent the interests of the employer and employees. Bargaining over such issues is said to offend the notion of the sovereignty of the state by permitting employee groups to have a unique and predominant input into the decision-making process to the prejudice of the public interest.[96]

This is not the appropriate forum to debate the appropriate scope of collective bargaining in the public sector. As we have earlier noted in our descriptive data, the members of the professions employed in a salaried context tend to be concentrated in the private sector. Nevertheless, at least two caveats must be registered against the preceding analysis. In the first place, defining the appropriate scope of bargaining in the public service is not an issue which pertains uniquely to professional employees. To the contrary, what is central to the preceding analysis is the fact of public rather than professional employment. Thus the arguments, advanced by those hostile to the accommodation of policy and process issues within the scope of bargaining, would apply to professional and non-professional public employees alike. Indeed it is implicit in such assertions that neither trade unions through bargaining nor professional associations by regulation should be permitted to by-pass or dominate the traditional channels through which other interest groups are obliged to make known their views on such matters. That is to say, to accept the wisdom of the conventional analysis would necessarily preclude <u>any</u> organization of professionals from exerting their influence except as they may do so through the normal political processes. In essense, any limitation that may be imposed on the collective bargaining process should constrain equally every other "extra political" process that

might be used by a self-regulating occupation.

As a second observation, notwithstanding its impressive catalogue of adherents, the preceding analysis is neither monolithic nor beyond criticism. Several equally persuasive arguments can be advanced which, in the absence of any legislative constraints to the contrary, would support and indeed encourage the parties to negotiate directly over public policy matters.[97] For example, it is generally recognized that the line between matters which are bargainable, and issues of policy and organization which are not, tends to blur when subjects such as student discipline,[98] the appropriate staff-student ratio, or number of policemen in a squad car[99] are raised. To the extent that many such "policy" issues impinge directly on the working conditions and professional aspirations of employees, under existing legal assumptions they would fall within the permitted scope of bargaining, notwithstanding their admitted impact on public policy.

Indeed, while recognizing the ultimate authority of the elected representatives to enact public policy which is within their legislative competence, bargaining with employees on a whole range of policy issues which directly impinge on their working environment and professional aspirations can be defended as a means by which some notion of industrial democracy can be achieved. Thus, as Mr. Justice Dickson, in an extra-judicial comment, has noted:

> "For myself, I do not find necessarily incompatible the desire to include one's financial lot into the medium of collective bargaining and a desire and competence to aid in the decision-making process of the enterprise, whether it be

industrial, educational or whatever. This is particularly true, in my opinion, with regard to professional people. So long as those who aspire to the status of professionals are prepared to pay the price by placing service of others ahead of personal self-interest in matters affecting others, it is perfectly proper, as it seems to me, for so-called management to forego some of its so-called rights. The conception of unrestricted discretion to management is incompatible with the attitudes of today. The need for the deeper involvement of the workers in the whole of society's legitimate activities does not admit to any such absolutist pre-emption. Management and workers have become social partners. In the educational arena teachers have been at the fringe of decision-making in schools. In the present state of society it is right that teachers be concerned with the whole operation and policies of the schools in which they operate and join with school boards, parents and students in the decision-making process.

The position taken on behalf of the school board seems to be that in establishing administrative and economic policies for the efficient operation of schools the boards must not abdicate the fundamental responsibility vested in them by the public to teacher unions. Consultation is necessary for the proper functioning of a system but the powers of full decision must be left to those responsible to the public.

It has been pointed out that the source of conflict between teachers and trustees over negotiating conditions of employment rests in two conflicting theories of the rights of management, viz., the residual rights theory and the collective bargaining theory. The residual rights theory holds that management retains all its traditional rights, functions and prerogatives in managing a system except that those rights may be modified or contracted away by specific provisions in the collective agreement. The collective bargaining theory, on the other hand, holds that management cannot act unilaterally on matters of salary and conditions of employment not specifically covered by collective agreement unless it consults with and obtains the consent of the union or bargaining agent. In other words, the management's traditional rights in those areas cease to exist when its employees become unionized and its rights thereafter are limited to those which it can successfully negotiate with the union. In my view, a school

> board can best exercise its statutory rights and obligations not unilaterally or arbitrarily, but after due consultation with teachers and through negotiations leading to agreement with teachers.
>
> Basic to the position taken on behalf of the school board, it would seem to me, is a lack of confidence in the motive of the teachers. Reference is made by Mr. Neal on behalf of the trustees to the insatiable appetite of teachers for more money, less work and more power. If this be the underlying motivation of teachers or if it continues to be thought to be so, the future of education within this country is dark indeed. Reflecting the lack of confidence is the emphasis placed by Mr. Neal on the adversarial nature of the relationship between teachers and trustees, the continuous confrontations, the equating of teachers with workers in a factory. This attitude pays no heed to the rightful claim of teachers to be treated as professional people, specialists in their chosen field of work. Mr. Neal properly emphasizes the responsibility to the public imposed upon those who accept the office of school trustee. Implicit in this argument, however, is the assumption that the teachers, if granted a voice in decision-making, will act irresponsibly and in a manner which will impinge upon the proper discharge by the trustees of their statutory obligations. It is not obvious to me that a partnership between the school board and teachers in the determination of policy matters will be to the detriment of the trustees or of the public. More particularly, it will not be to the detriment of the pupils whom all are seeking to serve."[100]

Far from being perceived as a subversion of democratic principles, expanding the scope of bargaining to permit employees to bargain about those policy issues which directly impinge on their professional development can be regarded as guaranteeing a modicum of democracy in the workplace. While conceding the sovereignty of the legislators ultimately to impose their policy choices, bargaining over the shape and content of that policy would ensure that the persons often most directly affected by it and who are expert in it, have a direct and meaningful role in the policy-making process. In such a scheme, participatory negotiation between employer and

employee rather than unilateral decision-making on the part of the employer, would become the process by which policies are shaped for public debate in the legislative forum. In this case, in our view, the ultimate supremacy of Parliament or any other elected agency is not subverted.[101] If permitting employees such direct access to the decision-making process, is prejudicial to the interests of other groups, the answer, in our view, would lie either in providing the means by which those groups could have similar access to the decision-making process or in creating environments through "sunshine laws", in which the wisdom and acceptability of a negotiated policy could be publicly debated and tested before it was firmly settled. This may require that professional employees and public sector managers engage in publicly-open collective bargaining ("bargaining in a fish bowl") when issues of public policy are at stake.

In fact, frequently the conventional or "proper" political processes and the accepted methods of influencing decision-making in the public arena are not particularly capable of accounting for the views of certain interest groups concerned with the outcome of such policy debates. It is often precisely because the 'normal' political processes are not well-suited to accommodate the views of various employee groups that alternate mechanisms, such as collective bargaining, are relied upon. In our view, the fact that such an alternative route into the decision-making process may enhance the influence of employee groups cannot be decried if ultimately the processes by which such decisions are effected are made subject to public scrutiny. Broadening the scope of

collective bargaining in the public sector to include such issues simply recognizes and attempts to respond to the disparate influence that various groups can exercise through conventional political channels. Seen in that perspective, providing employee groups with a more direct and effective input into the political process should enhance the quality of decision-making by obliging public officials to respond directly to their views. If public sector employers are ultimately required to account publicly for their policy choices, then bargaining with their employees, perhaps in a "fish bowl" or public forum, can properly be regarded as simply adding another route into the decision-making process which ensures the most effective participation by a group of persons directly affected by the outcome of that process. To accommodate such issues within the scope of permissible bargaining would, rather than undermine the democratic processes, merely restructure the means by which access may be afforded to that process.

Scope of Bargaining: Individual Merit

An additional issue of concern to all salaried professionals is the capacity of traditional collective bargaining regimes to accommodate the interests and ideosyncracies of its individual members. The professionals' pre-occupation with individual initiative and merit, noted in almost all of the literature,[102] is clearly manifested in the proposed Draft Professional Negotiations Act, put forward in 1966 in Ontario as a means of reconciling the rights of the individual employee with the collective aspirations of the unit.[103] In the absence of such specific legislation provisions, the question arises as to the compatibility of individual responsibility and initiative

with the premises which underlie a system of "collective" bargaining.[104]

In traditional collective bargaining models, upon certification an employer is precluded from bargaining with anyone or any other organization other than the certified agent.[105] Individual bargaining between employees and employer, under traditional notions of collective bargaining, is beyond the pale. Moreover, there is now a line of authority, propounded by the Supreme Court of Canada, which casts serious doubt on whether, in the absence of a specific legislative pronouncement, (such as exists in the School Boards and Teachers Collective Negotiation Act)[106], even individual contracts of employment may continue to exist in the context of a collective bargaining regime. This line of precedent evolving from Le Syndicat Catholique des Employes des Magasins de Quebec Inc. v. La Compagnie Paquet Ltee.[107] through until the more recent McGavin Toastmaster Co. Ltd. v. Ainscough[108] decision holds that:

> "...in the face of labour relations legislation such as existed at the material time in British Columbia, in the face of the certification of the union, of which the plaintiffs were members, as bargaining agent of a specified unit of employees of the company and in the face of the collective agreement in force between the union and the appellant company, [I do not think] it is possible to speak of individual contracts of employment and to treat the collective agreement as a mere appendage of individual relationships. The majority of this Court, speaking through Judson, J., in Syndicat Catholique des Employes des Magasins de Quebec Inc. v. Compagnie Paquet Ltee. (1959), 18 D.L.R. (2d) 346 at pp. 353-4, [1959] S.C.R. 206 at p. 212, said this in a situation where a union was certified for collective bargaining under Quebec labour relations legislation:
>
> > 'There is no room left for private negotiation between employer and employee. Certainly to the extent of the matters covered by the collective agreement, freedom of contract between master and individual

> servant is abrogated. The collective agreement tells the employer on what terms he must in the future conduct his master and servant relations...'

The situation is the same in British Columbia where the legislation in force at the material time stated explicitly that a collective agreement entered into between a union and an employer is binding on the union, the employer and the employees covered thereby: see Meditation Services Act, 1968, s. 6.

The reality is, and has been for many years now throughout Canada, that individual relationships as between employer and employee have meaning only at the hiring stage and even then there are qualifications which arise by reason of union security clauses in collective agreements. The common law as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement which, as the one involved here, deals with discharge, termination of employment, severance pay and a host of other matters that have been negotiated between union and company as the principal parties thereto. To quote again from the reasons of Judson, J., in the Paquet case, at p. 355 D.L.R., p. 214 S.C.R.:

> 'If the relation between employee and union were that of mandator and mandatary, the result would be that a collective agreement would be the equivalent of a bundle of individual contracts between employer and employee negotiated by the union as agent for the employees. This seems to be to be a complete misapprehension of the nature of the judicial relation involved in the collective agreement. The union contracts not as agent or mandatary but as an independent contracting party and the contract it makes with the employer binds that employer to regulate his master and servant relations according to the agreed terms!" 109

The rationale which underlies this conclusion is the recognized vulnerability of the collective regime in the face of individually negotiated agreements. As one court has summarized this point:

"But it is urged that some employees may lose by the collective agreement, that an individual workman may sometimes have, or be capable of getting, better terms than those obtainable by the group and that his freedom of contract must be respected on that account. We are not called upon to say that under no circumstances can an individual enforce an agreement more advantageous than a collective agreement, but we find the mere possibility that agreements might be made no ground for holding generally that individual contracts may survive or surmount collective ones. The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. Of course, where there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining. But to expect as so provided, advantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole. Such discriminations not infrequently amount to unfair labour practices. The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favours will generally in practice go in as a contribution to the collective result. We cannot except individual contracts generally from the operation of collective ones because some may be more individually advantageous. Individual contracts cannot subtract from collective ones, and whether under some circumstances they may add to them in matters covered by the collective bargain, we leave to be determined by appropriate forums under the law of contracts applicable, and to the Labour Board if they constitute unfair labour practices.

It also is urged that such individual contracts may embody matters that are not necessarily included within the statutory scope of collective bargaining, such as stock purchase, group insurance, hospitalization, or medical attention. We know

> nothing to prevent the employee's, because he is an employee, making any contract provided it is not inconsistent with a collective agreement or does not amount to or result from or is not part of an unfair labour practice. But in so doing the employer may not incidentally exact or obtain any diminution of his own obligation or any increase of those of employees in the matters covered by collective agreement".110

It is clear from these legislative and judicial pronouncements that, under the general labour relationssystems in force in this country, there is little tolerance for individual bargaining and individual contracts. That is not to say, however, that the "professionals' " traditional concerns over individual initiative and merit cannot be accommodated within the framework of collective bargaining. Those pronouncements merely ensure individual bargaining cannot be employed to subvert the collectivity. That concern aside, however, there is ample authority and experience to confirm that matters of individual merit can be and have been accounted for in collectively bargained agreements.[111] Thus, where a majority of the members so decide, and the bargaining agent accordingly gives it consent, a whole host of organizations, including the Association of Canadian Television and Radio Actors (ACTRA), virtually all associations representing university faculties and professional athletes, as well as those acting for physicians operating under publicly supported medical insurance schemes, can and have made provision for recognition to be given to individual merit and initiative. Indeed, where it is appropriate to do so, sanction may be afforded to individual bargaining.[112] Moreover, as noted in the preceding excerpt, where such relationships serve the interests of its members and the bargaining agent accordingly grants its consent, consideration of individual merit and initiative -- as opposed to

individual contracts -- are compatible with general collective bargaining legislation.[113] In short, salaried professionals presently are able, within the context of the existing collective bargaining legislation, to make whatever accommodation for individual initiative and responsibility that they may desire.

Bargaining Unit: Managerial Exclusions

In assessing the appropriateness of traditional legal structures to the situation of the employed professional, partisans[114] and commentators[115] alike have suggested that because a significant number of professional employees exercise some managerial authority, so many of their number would be exempted from engaging in collective bargaining by the relevant legislation that a viable collective bargaining relationship could never be established. In challenging the appropriateness of the general collective bargaining legislation to the circumstances of the professional employee on this basis, reference is often made to the section, common to all such legislation, which prohibits persons who exercise managerial authority, and who can therefore be expected to advance the employer's interest, from interfering with the employee's rights to engage in collective bargaining. With reference to the Ontario Act, for example, this section provides:

> "Subject to section 80, for the purposes of this act, no person shall be deemed to be an employee ... who in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations."[116]

The purpose of such legislation is to ensure that the collective bargaining relationship is an arm's length one. Accordingly, to ensure that the employee organization is able to act vigorously in

the interests of its members, and equally to make certain that the employer can expect the undivided loyalty of those persons to whom it has delegated the authority that is described in s. 1(3)(b), those persons are excluded from the scope of that legislation.[117] In short, it is to avoid a potential conflict of interest between the obligation to act on behalf of management and the personal loyalty that may be owed to one's colleagues that the dichotomy between employer and employee is drawn sharply at the level of managerial authority by such a provision.

Clearly, the identification and segregation of "employer" and "employee" personnel -- the touchstone of the adversary relationship -- is of central importance and lies at the heart of our system of labour relations. In the context of salaried professionals, however, it is argued:

> "In view of the generally responsible nature of professional services and duties, as well as the obvious cases where professional and management functions are fused, a relatively high proportion of salaried professionals are, by legal definition, and by decisions of labour relations board, excluded from collective bargaining rights. Thus the problem of management exclusions, with the corollary restriction on the size of the bargaining unit, has emerged as one of the most contentious points to be resolved before a bargaining relationship can be established.
>
> From some professional unions, notably the engineers, the struggle for broadly based bargaining units seems to be considered as a matter of life or death. Quebec engineers cite the demise of engineering unions in the United States to prove this point. Their argument runs as follows: Because bargaining units were restricted to the lowest level of engineers, the number eligible for membership was always too limited for effective countervailing power. In addition, with the management line drawn so low, companies could easily transfer or promote the union activist out of the bargaining unit, weakening the strength of the union still further."[118]

Indeed, it is contended that it was precisely that prospect which, in the early 1960's induced the professional engineers employed by the City of Montreal and by Hydro Quebec to avoid seeking certification under the Quebec Labour Code[119] and instead to seek incorporation under the Professional Syndicates Act.[120] Because of the terms of the latter legislation, the managerial issue could largely be avoided. As stated by one commentator:

> "Of the 555 engineers employed at Quebec-Hydro, 440 were finally recognized as being acceptable for representation through the syndicate, whereas, if certification under the Code had been required, only about 280 would have been in fact covered by the eventual agreement. This was a true victory for 'cadre' unionism."[121]

In our view, however, the concern of professional employees that an expansive application of the managerial exclusion would seriously undermine their ability to bargaining collectively has not been wholly dissipated by recent legislative and jurisprudential developments. In a variety of jurisdictions provision has now been made to extend the coverage of the legislation to persons whose duties include supervisory but not purely managerial functions.[122] Similarly, in Ontario, except for their right to withhold their services, principals and vice-principals have been afforded the same rights of collective bargaining as their fellow teachers.[123] Such provisions should ensure, in light of the jurisprudence described below, that many persons who, historically, might have been characterized as managerial persons, would not be so described today.

Moreover, even in those jurisdictions, such as Ontario, which have not included such provisions in their labour statute, the view has been expressed that:

> "... because of the dynamic contexts in which

> the Canadian labour relations system resides, (See John T. Dunlop, Industrial Relations Systems (1958) p. 7) the Board must constantly reappraise the standards and definitions of managerial personnel as a result of its unique role in provincial labour policy formulation; (see Note, Labour Law - The National Labour Relations Board Redefines and Restricts the Scope of Managerial Employee Classification, supra, p. 862). For example, accelerated corporate growth and a rapid advance in technology have given rise to a greater concentration of economic power on the side of management and a concomitant bureaucratization of jobs that involve less supervisory duties, public contact and upward mobility. Nowhere do we see this trend more prevalent than in the white collar sector of the Canadian labour market; (see generally S. Goldenberg, Professional Workers and Collective Bargaining Task Force on Labour Relations (1968); F. Bairstow, White Collar Workers and Collective Bargaining, Task Force on Labour Relations (1968); J. Crispo, ed., Collective Bargaining and the Professional Employee (1966); The Current Industrial Relations Scene in Canada, Industrial Relations Centre, Queen's University (1974), p. S-MP-9); and many legislatures in jurisdictions where labour boards have failed to be sufficiently appreciative of such contextual changes have now specifically provided for the extension of collective bargaining to these people; (See Canada Labour Code, R.S.C., 1970, c. L-1, s. 125(4), s. 107; Labour Code of British Columbia, S.B.C. 1970, c. 122, s. 1, s. 47; Manitoba Labour Relations Act, C.C.S.M., c. L-10, enacted by S.M. 1972, c. 75, s. 1(k)(i), s. 2(2)). The Ontario Board must be very conscious of the rapid growth in white collar employment and consider the implications it has to their decision-making function."[124]

From the reported awards it is clear that the Ontario Labour Relations Board has in fact been sensitive to these contextual changes and, most particularly in the case of professional employees, has included persons with such supervisory functions within the scope of the bargaining unit. For example, as recently as 1973 head nurses in the hospital setting were considered to be managerial persons excluded from the unit.[125] Since that time they have routinely been included in several general nursing bargaining units.[126] Similarly though there was once conflicting jurisprudence in the United States on the subject,

it is now settled, in Canada at least, that Departmental Chairman do not exercise such managerial functions as to merit their exclusion from the scope of the act.[127]

In articulating these conclusions, Labour Boards have described and relied upon several criteria which have direct application to many salaried professional groups. In the first place, Labour Boards have repeatedly emphasized that managerial exclusions must obviously vary from industry to industry. In addition, as the technical and professional expertise of the workforce increases, it is likely that their competence will obviate, to a significant degree, the need for some functionary to act in a supervisory or managerial capacity over them. On the contrary, those talents suggest that such persons will be particularly well suited to work with a minimum degree of supervision. Referring again to the Toronto East General decision the Board there noted:

> "Not only does this growth in the white collar labour sector represent a bureaucratization of jobs involving more reporting or conduit functions than managerial functions, but it also embodies in some industries, like in the one before us, an increase in the technical and professional competence of individual employees. Many people in the health industry - for example nurses and technicians - are highly trained individuals capable of exercising professional judgment with very little need for supervision. In fact, training builds supervision into the individual employee and may circumvent the need to have anyone of the equivalent status of the foreman in the industrial or manufacturing labour context; (see Simon, Administrative Behaviour, supra, p. 131). The following passage which captures these organizational developments is usefully reproduced in this regard, (The Current Industrial Relations Scene in Canada, supra p. S-MP-18):
>
> Supervision and Decision-Making Processes--The changing structure and attitudes of the new labour force will also require changes in

> the structure and nature of supervision. Emerging supervisory trends are: fewer levels and less supervision as increasingly workers have more built-in supervision through higher levels of education and training; broader spans of supervision; more emphasis on "colleague" rather than "executive" supervision; more rational and well-reasoned bases for supervisory actions. Supervision will also have to place more emphasis on people and recognition that people are different. Supervisory approaches must move away from the past heavy emphasis on undifferentiated treatment; ways must be found to administer differential treatment on an objective basis. As noted, too, supervisory and managerial officials will be required to develop mechanisms and an appropriate atmosphere for greater worker participation and involvement in decision-making processes. Non-negotiation in this area will be disastrous. We must engage youth more in the realities of the process, not to blunt their ideals, but to capture what is good and constructive in them and to harness their energies. No doubt some sparks will fly between the generations in the process. However, we should use these to fire the engine of progress rather than to ignore confrontations."[128]

It is on the basis of such reasoning that Labour Relations Boards are now inclined to draw clear distinctions between managerial responsibility on the one hand and mere supervisory and co-ordinating functions on the other. They have asserted that the touchstone of managerial responsibility lies in the ability "to affect materially the economic lives of [those] employees" who report to them.[129] Similarly, the Canada Labour Relations Board has recently rejected the criteria of "effectively recommending" in favour of the notion of "actually deciding" upon managerial issues, in its determination of who falls within the managerial exclusion.[130] Applied to the situation of professional employees, that Board wrote:

> "Obviously, under the Canada Labour Code as it now stands, the performance of functions of a highly technical or of a professional nature is not a bar to the inclusion in a bargaining unit. The Code now recognizes that professional employees may bargain collectively. Typically, a salaried professional

> employee, will normally enjoy a substantial amount of discretion in the exercise of his function, may be called upon to make decisions within his area of expertise and may, because of that expertise significantly influence corporate decisions of great importance. One need only think of the engineer who determines the essential technical specifications of a product or item which must be bought or sold, or of the lawyer who advises his employer in connection with a major suit. Yet, since professionals may nevertheless be "employees" within the meaning of the Code, the exercise of such technical expertise is not, per se, the performance of management functions within the meaning of the Canada Labour Code (Part V -- Industrial Relations)."[131]

In addition, recognizing the differences between the industrial model on which the various pieces of labour legislation were premised, and the professional white-collar contexts in which much of the present collective bargaining activity is taking place, the British Columbia Labour Relations Board in a series of decisions has advanced the view that, because of their training and qualifications, professional employees generally require less direction and supervision and that therefore their performance of such duties as hiring, employee evaluation, and work assignment alone would not of themselves warrant their being defined as having managerial responsibility. To the contrary, the British Columbia Board, in reasoning which closely parallels its federal counterpart, has expressed the view that the more significant sign of managerial authority lies in the power of actually deciding and not simply recommending upon such issues as discharge and promotion.[132]

From this brief description of the relevant jurisprudence on the managerial exclusion, in our view it is clear that the various Labour Relations Boards across this country have been sensitive to and have recognized the peculiar hierarchial structure that commonly

pervades the white collar and professional contexts. Indeed from the estimates of the experience in the Federal Public Service, it appears that only some 11.5% of persons employed in the professional and scientific category have been categorized as falling within the managerial and confidential capacity exclusions, even though those latter exclusions are drawn considerable wider than in the private sector. That figure compares favourably with a service wide average of 7.6%.[133] Moreover, the approach adopted by the various Labour Relations Boards os differentiating between employment contexts and analyzing each situation on a case-by-case basis, reflects the flexibility necessary to allow those Boards to accommodate the ideosyncracies of professional employment.

Bargaining Unit: Restructuring Occupational Alliances

It follows from this analysis of the various Labour Board decisions that many persons who exercise some supervisory functions will not fall within the managerial exclusion, and will thereby be entitled to the benefits of the legislation. Whether they should, by virtue of their supervisory functions, be placed in a separate bargaining unit from those whom they may supervise and direct is a discrete issue.[134] In our view, and against the preceding analysis, unless it were shown that to do so would create a conflict of interest, we cannot envisage any impediment to placing them in the same unit as the other professional employees. Accordingly, that issue, which is in fact anticipated in those legislative provisions that expressly extend bargaining rights to supervisory employees, would then be resolved solely on a determination of whether their inclusion in the larger unit could raise situations which would place

or expose those persons to a possible conflict of interest. Although clearly a possibility which must be anticipated and addressed, we would note, by the inclusion of head nurses, departmental chairmen, and high school principals in the general unit of employees over whom they have been supervisory authority, that it would appear to be an eventuality which will require a response only infrequently.

Apart from those legislative enactments which specifically address the question of whether supervisory employees ought to be included in a unit of salaried professions, that issue will have to be determined on the "community of interest" that prevails between these two groups. In that sense, the supervisory versus non-supervisory dichotomy is but one of many distinctions that has to be addressed in determining the community of interest appropriate for a bargaining unit which includes or embraces professional employees. Other distinctions involve paraprofessionals and technicians as well as even blue collar and white collar workers. At issue then is the larger question of occupational alliance. And, central to that issue is the distinction between craft and industrial bargaining units.

In the discussion that follows, reference will be made to the two traditional methods by which employees are grouped for purposes of collective bargaining. These two models, each reflecting unique philosophical and historical origins and about which the labour movement has had ideological and political struggles for the past half century at least, are known colloquially as the craft and industrial units. The former, embracing the notion of bargaining in groups restricted to, and delineated by, particular technical skills and excluding semi and unskilled persons has, in the medieval guild, a common origin with such other vocations as law and the ministry.

The industrial unit, less discriminating in its membership, describes a unit of all of the employees of a particular plant or employer who share a "community of interest" in their employment situation. Rather than focusing exclusively on the skill level, qualifications, or training of a particular workers to define the parameters of the bargaining unit, the industrial unit claims, against some geographical and employer boundaries, all of the workers who share a basic and common affinity or cohesiveness of interest in those matters commonly settled by collective bargaining.

Central to the description of an industrial unit, as defined by the various Labour Relations Boards, is the "community of interest" which binds employees of various skills, vocations and occupational callings. More particularly, the Ontario Labour Relations Board in assessing the appropriateness of such a bargaining unit, has particularized the essence of this paramount consideration in these terms:

> Community of Interest - This factor may be determined by considering the following criteria:
>
> (a) Nature of work performed - In the instant case, the employees of both locations performed the same type of work involving similar operations, even though different metals are processed at the two locations;
>
> (b) Conditions of employment - Similar working conditions and the same fringe benefits prevail at both locations;
>
> (c) Skill of employees - The skill of the employees as a group are similar at both locations;
>
> (d) Administration - The company administers both phases of its operations jointly;
>
> (e) Geographic circumstances - The two Plants in question are 2 1/2 miles apart in the same municipality;
>
> (f) Functional coherence and interdependence - The evidence discloses about ten instances of regular temporary interchange among employees who intermingle with employees of the other plants. In addition, although of less importance, a substantial part of the production is at one plant and completed at the other.[135]

Thus, rather than being the exclusive criterion on which employees will be grouped for collective bargaining purposes, the particular skills of the various employees becomes only one of the factors to be considered by the Board in striking what it believes to be a viable and rationale collective bargaining structure.

As to which of these competing structures is most appropriate for professional employees, again the legislative response has been diverse. Essentially, in North America at least, there have been three general responses forthcoming from legislatures. Firstly, for certain legislatures the distinctions, if any, between professional and other workers in an employment context are not so self-evident or compelling as to warrant any special legislative treatment. Accordingly, for this group, which includes Saskatchewan[136] and British Columbia[137] the delineation of the bargaining unit for or including salaried professionals will be settled along the general principles and on the usual criteria utilized by Labour Relations Boards. Essentially, as we have already noted, and as we shall elaborate below, the touchstone in making that determination involves an assessment of whether a community of interest exists between the relevant employee groups. It will be recalled that under similar legislative schemes in Ontario in 1943, and in Canada under P.C. 1003, bargaining units of professional employees were seldom recognized. Rather it was said "academic attainment [could not] by itself determine the community of interest."[138]

A second technique, situated at the other end of the spectrum, is revealed in a provision such as s. 6(3) of the Ontario Labour Relations Act. That section provides:

> "A bargaining unit consisting solely of professional engineers shall be deemed by the Board to be a unit of employees appropriate for collective

> bargaining, but, the Board may include professional engineers in a bargaining unit with other employees if the Board is satisfied that a majority of such professional engineers wish to be included in such bargaining unit."[139]

A similar provision, which applies not only to engineers, but as well to members of the medical, dental, dietetic, architectural and legal professions may be found in s. 1(5)(b) of the Industrial Relations Act of New Brunswick.[140] Similarly, under the Public Service Staff Relations Act,[141] pertaining to federal public servants, some twenty-eight distinct bargaining units each confined to an individual professional discipline have been struck.

This technique of deferring to the members of the professional group the determination of whether persons who are not members of their profession ought to be included in their bargaining unit, in effect sanctions the establishment of craft status for the professions identified.[142] However, such provisions which delegate the ultimate decision to the members of the profession do not of themselves preclude the establishment of a mixed unit. To the contrary, and as section 6(3) of the Ontario Labour Relations Act expressly recognizes, where the members of the profession so desire, and the unit proposed is otherwise appropriate for collective bargaining, a mixed unit of professionals and others may be established.[143]

Between those two approaches lies a third which has been embraced by the Canada Labour Code[144] and which has been adopted in part by the Manitoba Labour Relations Act.[145] Under these legislative regimes, the notion of "professional employees", rather than embracing only the traditional, prototypical professions, is expressly intended to include any person whose vocation calls for the application of some

specialized knowledge, usually acquired at a university or some other institute of higher learning, and who is eligible to be a member of a professional organization which is authorized to establish qualifications for membership in that organization.[146] Then, and against that definition, the Canada Labour Code, for example, has, in s. 125, provided that:

> "Where a trade union applies under s. 124 for certification as the bargaining agent for a unit comprised of or including professional employees, the Board, subject to subsection (2),
>
> (a) Shall determine that the unit appropriate for collective bargaining is a unit comprised of only professional employees, unless such a unit would not otherwise be appropriate for collective bargaining;
>
> (b) may determine that professional employees of more than one profession be included in the unit; and
>
> (c) may determine that employees performing the functions, but lacking the qualifications of a professional employee, be included in the unit."[147]

Under such a provision, and in contrast with the schemes presently employed in Ontario and New Brunswick, the wishes of the professional employees are not wholly determinative. As the concluding proviso of s. 125(3)(a) implies, the Labour Relations Board retains the overriding discretion to determine that a mixed unit of professionals and allied groups is appropriate for collective bargaining. This has resulted, for example, in the Canada Labour Relations Baord refusing to certify a unit restricted to professional engineers and architects on the grounds that there were few, if any, positions which were reserved solely for members of the professional group, and that to the contrary many other persons performed exactly the same functions as the professional employees. Their decision was premised on the

assertion that to allow a separate unit would be to sanction a bargaining unit which "would be based solely on personal qualifications and would have little or no basis in the organization of the enterprise".[148]

In general then the relevant legislation admits of no single, unified response to the specific issue of what is the appropriate bargaining unit for professional employees. In one sense, however, the question as to the propriety of bargaining units made up exclusively of professional employees mirrors a larger debate as to the relative merits of craft and industrial bargaining units generally. Put in that larger context, and given the virtually unanimous rejection of craft status for all other workers in the economy, except for those who practice one of the traditional skill vocations in the construction industry, it is, in our view, difficult to justify or support any legislative recognition, let alone extension, of craft status for professional employees. Indeed, the attention that has been given in some academic quarters and legislatures to craft units of professional employees is in sharp contrast with the almost complete and universal abandonment of craft units elsewhere.

The general deterioration in the status of the craft unit in the North American system of collective bargaining can be seen in a variety of contexts and from a number of distinct perspectives. First, it should be recognized that the concept of a craft unit itself has not been regarded either as a self-evident or a necessary concept. That is to say, in four Canadian jurisdictions, there is presently no express legislative recognition whatsoever extended to craft units. To the contrary, in Alberta, Prince Edward Island, Quebec and Saskatchewan, craft units like any other bargaining unit are determined

by the Labour Relations Board in accordance with the governing criteria that are utilized in assessing the appropriateness of any bargaining unit. Secondly, even in those jurisdictions which have given express statutory sanction to craft units, there can be no doubt that the legislatures have intended, from their inception, to limit their scope to existing and presently entrenched craft groups. These statutory provisions are in the North American context, therefore, purely retrospective and not prospective in their operation. In essence, as presently written, statutory descriptions of craft bargaining units are designed as much to discourage the formation of new craft bargaining units, as to recognize existing craft coalitions. Thus, as Willes has observed:

> "Craft severance provisions were designed in part to discourage the formation of new craft unions, and reduce interunion rivalry that might result if emerging crafts were given the same right to craft protection as the traditional craft groups. While this has undoubtedly contributed to stability in labour relations, it has resulted in considerable frustration for some emerging skills that feel they have no community of interest with other employees in a broader bargaining unit."[149]

Willes' observation is expressly confirmed in the reported awards of the Ontario Labour Relations Board which have characterized s. 6(2) of the Ontario Legislation as being intended to protect existing craft unions and not to encourage the creation of new ones.[150]

This avowed legislative preference to avoid the creation of new craft units and to restrict their existence to those places in which they have become entrenched, can be confirmed from a third observation. Section 6(2) of the Ontario Labour Relations Act now provides:

> Any group of employees who exercise tech-

> nical skills or who are members of a craft by reason of which they are distinguishable from the other employees and commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or crafts shall be deemed by the Board to be a unit appropriate for collective bargaining if the application is made by a trade union pertaining to such skills or craft, and the Board may include in such unit persons who according to established trade union practice are commonly associated in their work and bargaining with such group, but the Board shall not be required to apply this subsection where the group of employees is included in a bargaining unit represented by another bargaining agent at the time the application is made. [151]

However, it was not always so. Rather, as Sack and Levinson have described:

> In recognition of the traditional rivalry between craft and industrial unions in Canada (which ultimately abated with the merger in 1956 of the Trades and Labour Congress and the Canadian Labour Congress) the Act required the Board to certify on a craft basis whether or not the craft group already formed part of a larger industrial unit. While the Board restricted craft certification by requiring strict compliance with the statutory conditions, concern mounted over the fragmentation of industrial bargaining units. As a result, s. 6(2) of the Act was amended in 1960 to empower the Board in its discretion to refuse to carve out a craft unit from an industrial unit where the latter is, at the time of application, represented by an incumbent union. Again, in 1970, c. 6(2) was amended to empower the Board to refuse to sever a craft unit from an industrial unit where the group of employees in question are engaged in mixed crafts as members of a crew likewise so engaged. However, in a case where there is no incumbent union, the Board is still bound by the mandatory provisions of s. 6(2) to recognize craft rights in the circumstances indicated therein. [152]

In short, in those instances in which a union seeks to sever a group of skilled or professional employees from an existing bargaining unit, the legislature has now provided the Labour Relations Board with a discretion to refuse to grant that application. Moreover, and consistent with the clear legislative intention to

restrict their growth, Labour Boards have generally refused to allow a craft or skilled trades group to sever from a larger multi-classification unit where it is established that the group has been fairly and equally represented by the incumbent union.[153] Once it has been established that an "industrial" or "multi-classification" unit is a viable one, capable of fairly representing each of its constituent groups, the Labour Boards have generally refused to allow any separate groups within the unit to secede.

To summarize, except for the traditional trades in the construction industry, the efforts of various skill groups to achieve special and separate status in the form of craft bargaining units have largely proven to be unsuccessful and unavailing. Those endeavours have been unable to overcome a clear legislative preference to avoid craft bargaining units in all instances where it is politically feasible to do so. Thus, most legislatures in Canada either have refused to give the craft unit any special recognition at all, or where they have, they have done so as much to curtail and circumscribe its development as to give it its legislative imprimatur. In this sense, the recent interest in and debate over professional units represents, at the very least, something of an anomaly. For most other workers, the Legislatures together with the Labour Relations Boards have finally settled the issue.

Tracking the legislative experience of craft units serves more than simply documenting the historical record. More importantly, such an exercise reveals certain implicit values that the legislature has seen fit to promote. For example, it is clear from provisions such as s. 6(2) of the Ontario Labour Relations Act that by discouraging the evolution of new craft units, the legislature

anticipated and intended that it would thereby reduce inter-union rivalry and jurisdictional warfare and so enhance the prospects for industrial peace. In the current debate on the viability and logic of bargaining units restricted to persons of one or more professional disciplines, this value must not be lost sight of. The delineation of separate bargaining units for engineers, architects and other professional scientific groups in the context of a single employment relationship would be as disruptive of sound and stable labour relations and as antagonistic to industrial productivity and efficiency as the recognition of any skilled trade group in the industrial context. It would ensure that traditional professional rivalries would be perpetuated, if not encouraged, in the employment context at least.

Moreover, in discussing the concept of distinct bargaining units of professional employees it is not realistic to assume that such units could for long be restricted to engineers or to the other traditional professions. To the contrary, as Adams has written:

> "...it appears unfair to grant a special status to only the prototype professions. Many occupations are now based on systematic knowledge or doctrine acquired through long prescribed training and more often than not those performing such work adhere to a set of moral norms where such norms are relevant. Obvious examples include scientists, dietitians, occupational and speech therapists, social workers, psychologists, economists, nurses, mathematicians and professors. Is each group expected to lobby for special treatment and would special treatment along craft lines be practical?"[154]

Accepting the logic of Adams' argument, one would expect, if the concept of professional units took hold, that legislatures would reject the method of giving legislative recognition to particular

professional groups on an ad hoc, arbitrary basis. Instead, one would expect them to look to such models as the Canada Labour Code, or the United States National Labour Relations Act, s. 2(12) in which the rights of all professional groups to separate status would be assessed against common principles. For example, the definition provided in the National Labour Relations Act describes as a professional:

> (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the attempt produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical processes;
>
> (b) any employee who (i) has completed the courses of specialized intellectual instruction and study described in cluase (iv) of paragraph (a) and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).[155]

However, if one were to erect bargaining units on this more comprehensive and exhaustive definition of a professional employee, the prospects of securing any stability in the employment relationship would be remote. By way of example, a hospital which was required to recognize separate units of pharmacists, physiotherapists, dietitions, social workers, various technologists groups etc. would constantly be caught up in the bargaining process and would be seriously impeded in its attempt to establish a stable working environment.

Against the preceding analysis, it is clear that any policy choice which encourages the proliferation of professional bargaining units would run counter to the general trend against crafts units generally and would probably undermine the prospects for stable employer-employee relationships. Accordingly, strong arguments would have to be advanced to justify such an evolution for the benefit of professional employees. In our view, no such arguments can be advanced. Indeed we believe that the weight of the relevant arguments, experience, and jurisprudence confirms the identity of interests that exists between craft and professional workers generally, and demands that they be treated equally. In our opinion, the rationale which has supported the discouragement of craft bargaining units applies equally to the would-be proliferation of units of professional employees. In the absence of any distinguishing features to support the establishment of professional bargaining units, we would expect the current expression of public policy on the development of craft units to prevail.

In that regard the opinions of the Canadian Medical Association and Canadian Bar Association[156] or the Engineering Institute of Canada[157] should not be regarded as sufficient to warrant the recognition of a special status for professional employees. Nor should the educational qualifications or the licensing prerogatives of professional vocations be seen to be so unique, in the employment context, as to justify special recognition in collective bargaining legislation. With respect to the latter characteristic, we regard as definitive the analysis of the Ontario Labour Relations Board in its decision in Re Stratford General Hospital[158] in which it noted:

> "We are very hesitant to rely on the existence of licensing, registration and certification statutes with respect to certain occupations to grant special status under a labour relations statute to the salaried members of those occupations. To a great degree these statutes have been enacted to protect an inexpert public from the unqualified or unscrupulous practitioner and say little or nothing about the community of interest to the salaried members of a profession with other occupations. In fact, where the consumer is a small number of sophisticated employers or where the occupation does not consult or practice with respect to a broadly based lay clientele, licensing statutes are less relevant and less likely to exist."[159]

Nor should the educational standing of a professional group serve to so distinguish it from other skilled vocations as to warrant unique legislative treatment in the drafting of units that are appropriate for collective bargaining. Academic qualifications are often of dubious relevance to the actual performance of professional services, they are often difficult to assess, and they are capable of being subverted to further one's own professional ends. As noted by Adams:

> "Another point to be made is that educational requirements are capable of manipulation by an occupation 'on the make' and whether or not an occupation is engaged in such deception, educational requirements may not reflect the actual skill exercised in the workplace. While it is easy to identify different levels of education, as a general matter, it is much more difficult to determine whether the work performed by one occupation is any more difficult or deserving of special treatment than another. Who is to say that a physiotherapist performs a more complex function than a respiratory technologist although their levels of educational attainment are clearly distinct"?[160]

The view that it is the work performed and not the educational background that should determine the persons with whom a group of professional employees should bargain, is also reflected in the jurisprudence of the Canada and National Labour Relations Boards.[161]

Adams further observes that the requirement of university training -- a criterion integral to the definition of a professional employee under the Canada and Manitoba schemes:

> "...can amount to a very static definition in the face of something so dynamic as occupational change. We note that none of the occupations started out with a university level education requirement and those that now do, have experienced numerous changes in recent years. Similarly, technologist occupations have only recently been moved into a community college setting and it is difficult to predict future educational developments. For example, the length of the formal period of training for these occupations is unlikely to remain constant and the Board was told that in the United States technologists are trained in the universities. Thirdly, we question whether it is appropriate to distinguish between university and community college educations and then not distinguish between distinct levels of university training. Can it not be said that the former distinction is no more significant than the difference between a dietitian's and a psychologist's educational backgrounds for instance? Moreover, many of the witnesses on behalf of AAHP consider nurses to be health professionals and yet admitted that a nurse's training is not confined to the universities. We therefore, find, that in the circumstances of this case, the differences in educational training should not be considered a major or decisive factor."[162]

Professional standing, however defined, should not therefore, of itself warrant special legislative treatment for those persons who practise their trade in an employment relationship. Neither the status itself nor the educational or experiential qualifications which underlie it are particularly relevant to the creation and establishment of sound and viable bargaining relationships. In this regard, we would draw attention to the analysis of another panel of the Ontario Labour Relations Board which, when faced with a claim for a separate bargaining unit of physiotherapists and occupational therapists responded:

> "The applicant particularly emphasized that 'the professionalism' of therapists and the attendant implications of the effort exhausted in attaining and preserving their 'professional status' be the overriding consideration in measuring the community of in-

terests of physio and occupational therapists as a unit that is per se appropriate. This submission was amended somewhat in context of the recent Report of the Hospital Inquiry Commission (otherwise known as "The Johnston Report" in that the applicant was prepared as a result of the contents therein to represent for collective bargaining purposes allied paramedical employees engaged in patient care. The Board has often stated that the skills and peculiar working conditions of a group of employees is a relevant factor in determining whether those employees share a community of interest with other employees in a proposed bargaining unit. Our overriding concern in weighing this factor along with other criteria is that the parochial interests of these employees be accommodated in the event they are placed in a wider unit. The mere exercise of professional or technical skills standing alone will not necessarily justify their exclusion from an otherwise appropriate bargaining unit. (See The Essex Health Association Case O.L.R.B.M.R. Nov. 1967, 916). The implications of the word "professional" from the perspective of The Labour Relations Act has a peculiarly restrictive meaning. The Act recognizes the "professional" in terms of appropriate exclusions from the bargaining unit provided under Section 1(3)(a) and the peculiar status of "professional engineers" as defined under section 1(1)(L) is that an election is conferred on professional engineers as to whether they wish to bargain collectively as one unit or be included for this purpose with other employees in an appropriate unit (See section 6(3) of the Act). In the latter case, no other "profession" has extended this statutory privilege. Furthermore, there was no submission that the applicant is entitled or indeed eligible to represent therapists for a craft unit of employees defined under Section 6(2) of the Act. In order to acknowledge "the professional status" of the physio and occupational therapist the Board must accept at face value the applicant's submission in order to justify the restrictive and fragmented approach to determining under section 6(1) a professional unit confined to physio and occupational therapists. We are not prepared in the circumstances before us to accept the appropriateness of a separate unit of therapists based solely on claims for professional status unrecognized under the terms of the Labour Relations Act. The existence of a viable unit of employees for the full-time employees demonstrates that the particular concerns of the physio and occupational therapists can be anticipated and provided for in a collective bargaining agreement. Furthermore, the Board in determining the appropriate unit pays special regard to the functional coherence and interdependence of groups or categories of employees from operational sense in the process of discharging the purposes created by the employer's enterprise. (See: The Falconbridge Nickel Mines Ltd. case O.L.R.B.M.R. Sept. 1966, 379). In this instance, we have noted that the pervasive theme in the operation of the respondent's home

care plan is "the team approach" to resolving difficulties arising out of the treatment and rehabilitation of the patient. The application of the professional skills of the therapist for that purpose is undoubtedly a significant and essential service in achieving the goals of the programme. And indeed the functions of the secretary and the registered nursing assistant also contribute in some measure to the rehabilitation of the patient. Nevertheless, what is important from the Board's perspective in determining the bargaining unit is the shared interests of employees in negotiating through a bargaining agent terms and conditions of employment that accounts for their legitimate concerns. We find no basis for concluding that when non-professionals are lumped together with "professionals" the erosion of the specialists' skills in discharging their duties and responsibilities will result. The Board's concern is that the bargaining unit be viable in the sense that it maintains operational efficiency in the employer's business uninterrupted by the establishment of a collective bargaining relationship. (See for example: The East York Public Library Board case O.L.R.B.M.R. June 1971, 316). It has been demonstrated that this balance may be achieved through the vehicle of an all employee bargaining unit encompassing the "professional" employee whom the applicant seeks to separate. (See: The Toronto General Hospital case O.L.R.B.M.R. Janaury 1972, 33.)

In reaching this conclusion the Board is not unmindful of our recognition of registered and graduate nurses engaged in a nursing capacity as a separate but appropriate bargaining unit. (See: The Brockville General Hospital case O.L.R.B.M.R., January 1967, 776). Indeed, although the nurses retained by the respondent to participate in the home care plan are on a contractual basis through the Victorian Order of Nurses, nevertheless public health nurses in the respondent's employ are represented per se by the Nurses' Association under a collective agreement negotiated through voluntary recognition. The Board is concerned that it appear even handed in treating like bargaining situations consistently and fairly. We have concluded however that the nurses have established a past practice of bargaining separately and apart from other employees engaged in direct patient care that defies reversal at this late date. In this regard we have recognized the difficulties to the collective bargaining process that would be created in our dealings with the claims of registered nursing assistants for recognition as a separate unit of employees. That is to say, the resultant fragmentation of bargaining units compelling the employer to engage in multiple bargaining would be simply incompatible with sound industrial relations in the bureaucratic white collar setting. In treating the claims of the applicant's proposed unit we have foreseen and anticipated in the like manner the same difficulties in resolving to deny the request for a separate unit of

> part-time physio and occupational therapists. (See: The Essex Health Association case O.L.R.B.M.R. November 1967, 716; The York County Health Unit case O.L.R.B.M.R. April 1967, 62; The Board of Health of Niagara District Health Unit case O.L.R.B.M.R. January 1970, 1199)."[163]

To summarize then, there is little basis, if any, on which the interests of professional workers can be distinguished from those of craft units generally. The ability of professional employees to seek employment in a variety of labour markets, or to set up as independent practitioners, their size relative to other groups of employees and their fungibility with other occupational groups is not, in our view, qualitatively different from a number of technical and skill groups possessing these characteristics.[164] In the face of the clear legislative attempt to curtail the development and proliferation of separate interest groups based on particular skills, it would, apart from anything else, be clearly inequitable and discriminatory to except professional workers from such a policy unless it could be clearly demonstrated either that the policy was deficient or that professional workers were unique. As we have argued in the beginning of Chapter IV, we do not regard the employment problems of salaried professionals as being unique. Rather, we regard most employment issues as cutting across various occupations. Moreover, as we have argued in the section, "Scope of Collective Bargaining: Professional Status" in this chapter, those matters of particular concern to professionals, can and have been accommodated by the collective bargaining process. In short, we are satisfied that the same reasoning and rationale which supports the inclusion of skilled workers in all-employee-units where there is a community of interest between such workers applies to professional workers as well. We are fortified in this conclusion by the recom-

mendation of the Johnston Commission, which, when asked to delineate appropriate bargaining units in the hospital sector, justified a single paramedical unit, including all professional and technical employees, except nurses, on these grounds:

> "The recommendation that there be three employee categories is designed to limit the amount of fragmentation that might accompany an increase in organizing activity in the paramedical field. While recognizing that each paramedical profession has its own identity, we consider that, for bargaining purposes, a legitimate community of interest exists across the whole of the paramedical group. Within this category there are two possible sub-categories. These are:
>
> (a) Pharmacists, dietitians, physiotherapists, occupational therapists, psychologists and social workers. These groups are directly concerned with the mental and physical rehabilitation of patients.
>
> (b) Medical laboratory technicians, x-ray technicians, EEG technicians, registered records librarians while performing distinct functions have technical qualifications.
>
> In British Columbia groups (a) and (b) have been combined into a single unit for certification purposes. However, in Saskatchewan and New Brunswick they are considered separate groups. Our view is that the O.L.R.B. should not certify these groups separately. We believe the job evaluation programme described earlier will work out the appropriate internal relationships between and among these occupational categories so that internal rivalries which might manifest themselves in bargaining should be minimized. Furthermore, these groups share the common experience of a professional special education and, by and large, recognize the hospital as a primary, if not paramount, employer. Finally, we believe that a proliferation of unions is not advisable in the hospital field and organizing and negotiation resources which are scarce enough at present should not be spread over multi-jurisdictional boundaries. Hence, we prefer the British Columbia model for paramedical employees who wish union representation.[165]

In advancing the thesis that the claims and interests of professional workers are neither so particular nor so unique as to

warrant special legislative recognition, it is important to recognize that we have not argued that professional units are inappropriate for collective bargaining. To the contrary, such a determination would be entirely consistent with the preceding analysis in those circumstances when it was established to the satisfaction of the Labour Relations Board that, in the context of their actual work experience, there was a separate and identifiable community of interest amongst such persons which warranted the establishment of such a unit, and which would be viable for the purposes of collective bargaining.[166] However, in those circumstances a professional unit would be mandated on a case-by-case basis, under the Board's general authority to assess the appropriate unit: the decision would not be made on some a priori statutory recognition of the 'professional status' of particular vocations. Such an approach is clearly preferable not only because it resolves the claims of professional employees on exactly the same principles and against the same criteria as other workers, but as well, such a flexible approach has the clear advantage of allowing the relevant Labour Board to respond to the particular needs of specific employment relationships rather than being constrained by predetermined and more rigid descriptions of appropriate bargaining units.[167]

In fact, in our opinion and in light of the existing jurisprudence, such an approach would likely result in the certification of bargaining units of professional employees who were drawn from various disciplines and vocations. That is to say, on the criteria described, often a community of interest between various professional groups could be identified which would support the establishment of a mixed professional unit. And, while it is true that usually those

criteria will not permit the establishment of single units for each separate profession, nevertheless, it should be recognized that when professional employees have sought to be certified, in the private sector at least, they have rarely done so for separate and distinct units which conform to their particular professional discipline.[168] Thus, as earlier noted in Re Northern Electric Co., Re Stratford General Hospital,[169] the members of those professional disciplines which sought certification are themselves usually cognizant of the similarity of interests and functions performed by other professional workers and on that basis seek a multi-professional unit.

That proclovity,[170] has in fact been widely observed. Indeed, the concept of a multiprofessional unit is one that the legislatures have adopted in the Canada Labour Code and in the legislation governing the collective bargaining rights of the public servants in British Columbia.[171] As well, it was the substance of one of the main recommendations put forward by the Johnston Commission with respect to collective bargaining in the Ontario hospital sector.

The advantages of the multiprofessional unit, where it can be supported on the traditional criteria, are manifold. Stability in the enterprise will be enhanced. The tensions induced by interprofessional rivalries and jurisdictional disputes will be internalized within the constitutional structures of their bargaining representative and resolved on the basis of internal union trade-offs. As well, by including all those professionals whose duties and responsibilities are closely related, such units are likely to prove to be more viable and amenable to the collective bargaining process by inhibiting the employer's ability to secure substitute services.

While certain professional groups have recognized the desirability and indeed the practicability of including professionals from related disciplines within their bargaining structure, this perception has not been so expansive as to induce them to include non-professional groups within the unit. In almost all instances the inclusion of various technician and technologist groups has been regarded, by the professionals at least, as diminishing their status as professionals.[172]

In our view, however, the same arguments which support the establishment of mixed professional units may, on occasion, also justify the inclusion of non-professionals in a single bargaining unit with professionals.[173] Thus, for example, in the Bell Canada[174] decision where it was found that other professional persons, as well as certain non-professional groups, performed the same functions and duties as the professional engineers and that with isolated exceptions there were few positions reserved solely and exclusively for the latter, the Labour Board noted, as one of its reasons for refusing to sanction a professional unit of engineers, that

> "The unit which is determined must take into account the structure and organization of the enterprise so that its members stand at least a reasonable chance of effectively engaging in collective bargaining with the employer."[175]

Indeed there have been instances, for example, in the enactment of the Crown Employees Collective Bargaining Act,[176] when a legislature has seen fit to include particular professional groups such as registered nurses in a bargaining unit made up almost entirely of "non-professional" workers.

Moreover, one must not lose sight of the fact that the concerns of professional groups as to the integrity of their professional status, when they are included in such units,[177] is an apprehension

which is shared by any occupational or trade group which does not numerically dominate the bargaining unit within which it is included. Labour Boards, properly in our view, have not regarded these subjective fears to be of such critical significance as to warrant the establishment of a separate unit for each interest or occupational group which is so situated.[178] Rather, only in those instances where it is demonstrated that a particular group of employees within a bargaining unit have been less effectively represented than other groups in the unit would the creation of a separate unit be warranted.[179]

In essence, it has been assumed that employees who share a community of interest in their common work experience can accommodate whatever unique and particular claims may be advanced by any of the other groups with whom they bargain. In this function the task of the bargaining representative to accommodate, compromise and resolve the competing claims of specific interest groups is central to its very purpose and is integral to any "industrial" unit grouping. The fact that in the present context a bargaining agent may occasionally be required to reconcile professional aspirations against other claims does not materially alter the nature of this task which is basic to the role of a bargaining representative. As we have earlier noted, the causal factors which have motivated the recent interest amongst professionals in collective bargaining closely parallel those felt by employees generally. Thus, their concern over the relentless bureaucratization and compartmentalization of professional work, the desire to play a more direct and meaningful role in the decision-making process of the workplace, and their desire for job security and financial remuneration are all shared, to varying degrees, by most occupational groups. In the result, the perceived tension between

professional aspirations and worker demands may reflect more a subjective attitude of social consciousness than a sharp cleavage of divergent interests.

In addition, even if, on occasion, the claims of various professional or allied groups do conflict, we think it preferable that those disputes be raised and resolved within and under the auspices of the bargaining representative unless it can be demonstrated that it is incapable of fairly and equitably performing this function. In our view, such a technique of dispute resolution will further stabilize the employment relationship by helping to accommodate and reduce the incidents of jurisdictional disputes between competing employee interests. That is, by requiring the employees themselves to accommodate, compromise and settle the claims of special interests when they conflict, it will ensure the maximum degree of participation and control by the persons who are directly affected by the resolution of those matters. Furthermore, it can reasonably be expected that by requiring the claimants themselves to resolve directly the source of their differences within the constitutional structures of their bargaining representative an element of consensuality and acceptability will be attained which should enhance the viability of whatever resolution is achieved. As well, by internalizing the professional or jurisdictional rivalries within the structures of the bargaining representative, fragmented and often counter-productive bargaining structures can be avoided.

In sum, it is our conviction that neither the interests nor goals that professional employees seek to further in the employment relationship, nor their professional or educational standing are so unique from those held by most employees, regardless of their

vocational experience or training, as to warrant special collective bargaining legislation. To the contrary, we believe that concepts on which the present legislation is structured and the principles utilized by Labour Relations Boards generally in delineating the units that are appropriate for collective bargaining, are sufficiently sensitive to the interests and needs of professional workers as to preclude the need for any special legislative treatment. In our view, considerations of equality of treatment, stability in employment relations, and maximizing the participation of employees in the decision-making process all suggest such a conclusion.

However, given the extensive rule-making authority that is delegated to and exercised by Labour Relations Boards over the bargaining structures through which professionals would be constrained to accomplish their professional ends, we would recommend that some recognition in the membership of those agencies must be given to these professional groups. Only if they have such representation will these groups have confidence that their professional interests and aspirations have been fairly and fully considered by such a tribunal. By ensuring that professional groups are properly represented in the membership of such agencies, one is confirming that their rights are identical to those other employee groups who presently are represented in the membership of these Boards.

The Bargaining Agent: The Case Against Self-Regulating Associations

In the previous sections we argued that there is nothing so unique to the circumstances of the professional employee as to warrant special legislative treatment with respect to the basic legal structures common to most systems of collective bargaining. In this section we

must add one caveat to that conclusion. Specifically, we will argue that those professional associations with the licensing power ought not to be allowed to bargain for its salaried members at the same time as it has powers of occupational licensing. In Chapter IV we had argued that most professional societies were not particularly effective in representing the interests of their salaried members: here we argue that they ought not to be allowed to become effective bargaining agents for their salaried members.

Throughout this paper we have held to the position that ultimately the rationale which supports self-regulation by an occupational group must be founded on the premise that it is a device which is integral to the protection of the members of the public who utilize the services of that profession. From this it follows that schemes of occupational licensure should not be utilized mainly to advance the economic and social well-being of the members of the profession. Indeed, in rating alternative schemes of occupational regulation, the ability to avoid potential conflicts of interest would rank high in most scales of priority.

This thesis lies at the heart of much of the recently enacted Professional Code[180] in Quebec. As well, it is a proposition which has been recognized and accepted by many professional groups who are constrained to bargain with various governmental agencies in the matter of the fee schedules that are to be paid under publicly-financed schemes for their professional services. As one commentator said:

> "In its report The Professions and Society, the Castonguay-Nepveu Commission insisted that corporations to which the state delegated the power to ensure the protection of the public should not

> endeavour at the same time to protect the economic interests of their members. It was with this in mind thatthe Commission of Inquiry stated in its report that a professional corporation should not play a decisive part in establishing schedules of professional fees."[181]

Recognizing that a system of self-regulation can operate to enhance the self interests of its members, some self-governing agencies have sought to divest themselves of major ostensible roles in promoting their members' own social and economic interests. For them a clear segregation of interest and function is irreducible. By way of example, the physicians in Ontario now bargain for their fee schedule under the Ontario Hospital Insurance Plan through the Ontario Medical Association rather than under the auspices of the College of Physicians and Surgeons. This is in sharp contrast with the method adopted by the Law Society of Upper Canada which both regulates the profession and negotiates fees under the Provincial Legal Aid scheme.

Motivated by this same desire to avoid the conflict of interest that is implicit in many of the activities that may be undertaken by professional associations, various legislators, professionals and commentators have recommended that the professional organizations, which are charged with the task of licensing those who will be entitled to practice the profession, should be prohibited from acting as the certified bargaining agent for any of its salaried members who work in an employment relationship.[182] A clear and unambiguous division of function and purpose enhances the credibility and public acceptability of the professional association and furthers the basic postulates which underlie the concept of self-regulation. This is so even though it may be practically impossible to preclude collusion between the governing professional association and some other agency charged with the responsibility of furthering the social and

economic interests of the profession. Thus, in Quebec, both the Labour Code and the Professional Code now require that salaried professionals must organize in groups distinct from their professional associations for purposes of collective bargaining.[183] Similarly, the experience of the professional engineers in ontario, well documented elsewhere,[184] has induced leaders of that profession to support the creation of separate associations to further the collective bargaining interests of its salaried members.[185]

Common to all of these perspectives is the recognition of the danger to the public interest that is implicit in certifying as a bargaining agent an entity which has the exclusive authority to license those who are entitled to practice that profession. Even if publicly eschewed, the temptation to restrict the numbers admitted to the practice of that profession in order to enhance the bargaining power of its members, is seen as derogating from the perceived status of an association whose licensing prerogative is granted solely to further the public interest. It is to ensure that occupational licensing is exercised exclusively in the public interest that commentators have uniformly recommended against permitting the professional association from acting as the bargaining agent for any of its members.[186] In the words of one observer:

> "A second and related problem is the question of whether or not there should be a separation of the licensing or public-interest function from the collective bargaining or self-interest function. From society's point of view it seems to me that it would be intolerable to permit a combination of these two functions under one body. It would then be too tempting for a group to use licensing, in the name of the public interest, to restrict numbers and improve self-interest. I do not think this is a risk the public should be asked to accept."[187]

There is a second reason, founded in labour relations policy which also strongly argues against permitting a professional licensing authority from acting as the exclusive bargaining agent for any of its salaried members. This policy, which is reflected in each of the various collective bargaining statutes in this country, holds to the view that it would be incongruous, destructive of sound labour relations policy and indeed potentially subversive to the public interest to allow an employer or employer organization to interfere with or participate in the affiars of the trade union with which it will negotiate and enter a collective agreement. The premise underlying this policy is the belief that it requires an independent and bona fide employee organization, wholly separate from any employer influence, to support a legitimate, arms-length relationship that is essential to a viable and bona fide collective bargaining relationship. That policy is explicit in s. 12 of the Ontario Labour Relations Act which provides:

> "The Board shall not certify a trade union if any employer or any employer organization has participated in its formation or administration or has contributed financial or other support to it..."[188]

In the result, if an employee organization admitted to membership persons who were of managerial rank or authority, and who were thereby considered to represent the employer, its application to be certified would be dismissed on the terms of the above-noted provision.[189] In addition, a professional association that received financial support from employers would be similarly disqualified as a bargaining agent.[190]

In light of such a legislative prohibition, it would seem beyond dispute that an organization such as the Association of Professional Engineers of Ontario (A.P.E.O.), which embraces a hetergenerous membership group, some of whom have been characterized as 'employer

(managerial) professionals' and which may be the recipient of employer funds would be disqualified from representing any of its members as their certified bargaining agent. There appears to be no basis to distinguish and except the A.P.E.O. from the clear thrust of this central labour relations principle. The inappropriateness of coming to any other conclusion has been succinctly summarized by another commentator in these terms:

> "The fact that members of the same profession may be employers or employees, and that, in the latter capacity, they may perform a variety of supervisory or non-supervisory roles, does not affect their membership in a single professional association but frequently places them on opposite sides of a common bargaining table. When the bargaining relationship involves a conflict of interest between members of the same profession, it has been suggested that it is incongruous, in principle at least, for the professional association, to which they all belong, to act as agent for one of the parties. The negotiators might be caught in a serious dilemma of divided loyalty." [191]

Accordingly, whenever a professional licensing authority has its membership persons who act in a managerial capacity, existing labour relations statutes would uniformly preclude that authority from acting as the exclusive bargaining agent for any of its members.

There are other reasons also lodged in labour relations legislation and policy, which support the separation of the self interest from the public interest function and which warrant precluding professional licensing bodies from being able to enter collective bargaining relationships on behalf of any of its members. As was noted, the present legislative definition of a trade union requires that the purposes of such an organization must include the regulation of relations between employers and employees.[192] Our search of the relevant statutes, regulations and by-laws of the four professional associations under scrutiny revealed no such avowed purpose.

Accordingly, it is unlikely that such organizations could presently meet the required definition of a trade union to bring it within the terms of the relevant collective bargaining legislation.

Pragmatic consideration of its viability as a bargaining representative rather than on its legal status, can also be advanced as a reason to preclude the professional licensing agency from bargaining on behalf of its members. A professional association which has as its primary focus a practitioner orientation and/or which is dominated by members who have a philosophical if not financial commitment to an employer perspective, may well be unsympathetic to collective bargaining and as such may impede those of its salaried members who seek to advance their own ends through such a process.[193] Clearly a dilemma for its salaried membership when the professional association is dominated by such adverse or unsympathetic interests, this ideological division within the association may even inhibit the attainment of collective bargaining when its salaried members predominate numerically if the Association is less decentralized and democratized than would otherwise be expected in a traditional union setting.[194] The vivid description of the embittered experience of those salaried professional engineers in Quebec who, notwithstanding the fact that they made up more than 90% of the profession, encountered prolonged and substantial opposition from their self-regulating body, eloquently attests to that fact.[195] The frustrations of the salaried engineers in Ontario with their professional society during the 1960's, offers further confirmation.[196] Moreover, apart from reducing its viability as an effective bargaining agent, such an ideological clash within the Association could well create incentives for those in control to abuse their mandate to further the public interest in order to enhance the collective bargaining philosophy of their own particular

faction.[197]

The certification of professional licensing associations could occasion one other deleterious effect. Such a development could actually restrict and impede the development of collective bargaining by professional employees by precluding labour boards from certifying on any basis other than on bargaining units restricted to single professions. It is true that Labour Relations Boards are not lawfully entitled to consider the fact that an employee organization may discriminate in its membership provisions on grounds other than those generally proscribed in the traditional Human Rights legislation (having to do with age, sex, race, creed, nationality, etc.)[198] However, in our view, it is unlikely that such tribunals would find as appropriate bargaining units which included in addition to the professional members of the applicant authority, persons who were members of other professional disciplines or who were non-professionals. In short, collective bargaining by the professional, self-regulating societies, with their restricted membership requirements, would be inimical to the development of multi-professional bargaining as well as all-employee units containing professionals, para-professionals and technicians, learners, and others amongst whom there may be strong functional ties.

Apart from that single limitation on professional employees' rights to select the agent through which they will engage in collective bargaining, we are of the view that such persons should, as virtually all employees covered by labour relations legislation do, have the freedom to select whatever trade union they desire as their exclusive bargaining agent. That is, the principle enshrine in virtually all labour relations legislation by which employees are free to join a

trade union of their own choice ought to prevail. Although certain pieces of labour relations legislation, such as the School Boards and Teachers' Collective Negotiations Act[199] have denied particular employee groups this traditional right in favour of designating a particular bargaining agent for them, it appears that such legislation commonly reflects unique constraints and historical forces in particular employment sectors, rather than any overriding policy considerations. Nor is it the case that the existence of certain professional employees who have supervisory or managerial authority over other non-professional workers should preclude the former from choosing the same trade union that represents the latter as their exclusive bargaining agent.[200] While perhaps justifying a separate bargaining unit, such a relationship does not warrant the restriction of the professional employees' rights to join the trade union of their own choosing. Subject to the disqualification of the professional licensing authority as a trade union, professional employees should be treated as any other group of employees and be permitted to bargain through the agency of their own choosing.

FOOTNOTES

FOOTNOTES

1. T.E. Stivers, Comparison of Exemptions under State Engineering Registration Laws, (Georgia: mimeo., 1972).

2. Hughes, Professions, Daedalus (Fall, 1963), p. 663. See also Smigel, The Wall Street Lawyer, (New York: Free Press, 1964).

3. For a similar conclusion see L'Office des Professions du Quebec, The Evolution of Professionalism in Quebec, (Quebec: Office des Profession du Quebec, 1976), pp. 28-29. See also, for a discussion and evaluation of the various definitional approaches and criteria suggested to date, A. Kleingartner, Professionalism and the Salaried Worker Organization. (University of Wisconsin: Industrial Relations Research Institute, 1967), Chapter 1.

4. National Labour Relations Act, 49 Stat. 449 as amended by 61 Stat. 449 as amended by 61 Stat. 136 and 73 Stat. 519, 29 U.S.C.A. s. 41 ff.

5. E.G. Wilensky, "The Professionalization of Everyone," (1964) 60 Am. J. of Soc. 137.

6. The Evolution of Professionalism in Quebec, n. 3, supra.

7. Ibid.

8. The Evolution of Professionalism in Quebec, supra note 3. The Royal Commission on the Inquiry into Civil Rights, Report No. 1, Vol. 3 (Ontario: Queen's Printer, 1968), at 1161 ff.

9. Wilensky, The Professionalism of Everyone, n. 5, supra.

10. In the context of an "organized" work situation the parties would, by virtue of the relevant labour relations legislation, be the employer and the bargaining agent. In the context where no union was in existence, the parties would be the individual employee and his/her employer.

11. These implications are set out more fully in the summary and overview presented at the outset of this paper.

12. M. Gunderson, "Professionalization of the Canadian Public Sector," Report to the Institute for Research on Public Policy (Toronto: Institute for Policy Analysis, 1977), p. 5.1.

13. The extent to which differences in earnings is simply compensation for such factors as life cycle patterns, age, risks and the nature of work, is an empirical question beyond the scope of the paper. The basic point is simply that salaried professionals have considerably lower earnings than their self-employed counterparts and that this is a comparison that they might often make.

14. Ontario, Royal Commission on the Inquiry Into Civil Rights. Report, No. 1 Vol. 3 (Ontario: Queen's Printer, 1968), p. 1161 ff.

15. Ontario, Task Force on Industrial Training. Training for Ontario's Future (Dymond Report) (Ontario: Queen's Printer, 1973), pp. 163, 170-171.

16. T.H. Marshall, "The Recent History of Professionalism in Relation to Social Structure and Social Policy," (1939) Canadian Journal of Economics and Political Science 325. The Evolution of Professionalism in Quebec, supra note 3 at p. 25 ff. C. Tuohy, and A. Wolfson, "Self-Regulation: Who Qualifies" in M. Trebilcock and P. Slayton (eds.), The Professions and Public Policy, (Toronto: University of Toronto Press, 1978). It is worth observing that the presence of these theoretical premises will not, in every case, be seen to warrant the construction of self-regulation models. The failure to impose such schemes in the case of airline pilots, air traffic controllers or elevator technicians, for example, confirms the inconsistency of the legislative response.

17. J.W. Garbarino, Professional Negotiations in Education (1968) 7 Industrial Relations 93.

18. See, for example, The Royal Commission on the Inquiry Into Civil Rights, Report, supra note 8 at p. 1205; A.M. Carr-Saunders and P.A. Wilson, The Professions (1964) p. 395.

19. G.W. Adams, "Collective Bargaining by Salaried Professionals" in The Professions and Public Policy op. cit., supra note 16: also published in 32 Relations Industrielles 184. See also, Re Stratford General Hospital 1976 O.L.R.B., 459, 499.

20. The Evolution of Professionalism in Quebec, supra note 3 at p. 43 ff.

21. The Evolution of Professionalism in Quebec, supra note 3 at pp. 43-44.

22. It is beyond the purview of this paper to discuss in detail, as we have with the processes of collective bargaining and self-regulation the relative merits of such schemes of public regulation. Rather, we are suggesting that such schemes, seen in the context of and its supplements to the collective bargaining process, can be regarded as additional tools available to policy makers. For a discussion of some of the deficiencies of the present schemes of public inspection and standards legislation and how they might be rectified, see Cornell, Noll and Weingast "Safety Regulation," United States National Science Foundation, mimeo. (1976).

23. Training for Ontario's Future (Dymond Report), supra note 13 at pp. 170-171.

24. Evidence that professions artificially restrict supply is given in, (for example): D. Dodge, "Artificial Restirctions in Labour Markets" in Canadian Perspectives in Economics (Toronto, 1972), and in A. Maurizi, "Occupational Licensing and the Public Interest" 82 J.P.E. 399 (March/April 1974). In the latter study, empirical evidence in the United States is presented which indicates that in the short run, supply restrictions are accomplished through varying the pass rate on professional examinations. Specifically, in periods of excess demand when salaries are temporarily raised, the pass rate has been lowered (i.e. a smaller percentage paid), and this prevents a rapid influx of new

practitioners who would otherwise create a lowering of incomes.

25. Training for Ontario's Future, supra note 15 at p. 160.

26. R. Dussault, and L. Borgeat, "Reform of the Professions in Quebec." (Quebec: Office of Professions, 1976) p. 12, 13. Also published in 34 Revue du Barreau 140.

27. In general, even in the face of statutory enactments delineating exclusive rights-to-practice, employers have retained their right to assign work. See, for example, S. Goldenberg, Professional Workers and Collective Bargaining, Woods Task Force Labour Relations Study No. 2 (Ottawa: Information Canada, 1967) p. 255.

28. A. Cartier, The Management of Professional Employees, (Queen's University, Industrial Relations Centre, Reprint #10).

29. Re Seneca College and C.S.A.O. (1976), 12 L.A.C. (2d) 27 (Weatherill).

30. See Canadian Labour Arbitration Topic 7:3600. See also Employees Health and Safety Act, S.O. 1976 c. 79, s. 2 (Bill 139).

31. See N.W. Chamberlain, The Union Challenge to Management Control 98 (1948). See also G.W. Adams "Collective Bargaining for Salaried Professionals," supra note 19.

32. See, for example, Blanpain, R., "Worker Participation" (1976) Lab. Gaz. 470; Bandien, R., "Workers on the Board..." (1976) Lab. Gaz. 531; Elling, K.A., "Co-Determination by Decree" (1976) Lab. Gaz. 533; Hammarstrom, O., "Negotiation for Co-Determination" (1976) Lab. Gaz. 535; Finn E., "In Praise of Participation" (1977) Lab. Gaz. 5; Dutour, G., "Canada Cannot Import German-style Co-Determination" (1977) Lab. Gaz. 9; Boyd et al., "Worker Participation and the Quality of Life" (1977) Lab. Gaz.71 (Feb.).

33. A. Kleingartner, Professionalism and the Salaried Worker Organization supra note 3 p. 103. See also D. Fraser and S. Goldenberg, Collective Bargaining for Porfessional Workers, 20 McGill L.J. 456.

34. A. Kleingartner, Professionalism and the Salaried Worker Organization supra note 3 at p. 46 ff. and 104 ff., J.W. Garbarino, Professional Negotiations in Education (1968) 7 Industrial Relations 93.

35. The Evolution of Professionalism in Quebec supra note 3 at pp. 43-44.

36. Examples of collective agreements containing provisions for paid educational leave, and guaranteeing attendance at educational conferences are now commonly negotiated by many professional groups. See, for example, Article 20 of the Collective Agreement negotiated on behalf of the law group in the federal Public Service Code 210/74 or Article 26 of the corresponding agreement for the Engineering group. And see generally, F. Baristow and C. Sayles, Bargaining over Work Standards by Professional Unions in Collective Bargaining and Productivity, IRRA 1975.

37. E.G. Ontario Labour Relations Act, R.S.O. 1970, c. 232 as amended s. 14.

38. The Evolution of Professionalism in Quebec, supra note 21 at p. 44.

39. The Professional Engineers Act, R.S.O. 1970, c. 366 as amended, ss. 1(i) (j), 27.

40. See S. Goldenberg, Professional Workers and Collective Bargaining, Woods Task Force, Labour Relations Study #2, 1967, p. 255; C.M. Bailey, "The Experience of the Engineering Profession with Collective Bargaining" unpublished paper presented to the National Conference on the Professions and Public Policy, Law and Economics Programme, University of Toronto, 1976.

41. A more detailed discussion of the constraints faced by professional self-governing bodies as a result of their hetergeneous membership follows in the section, entitled Bargaining Agents, infra at p. 127.

42. A. Kleingartner, Professionalism and The Salaried Worker Organization supra note 3 at p. 106. G.W. Adams, "Collective Bargaining by Salaried Professionals," op. cit., supra note 16.

43. A. Kleingartner, ibid., at pp. 104-5.

44. H.W. Arthurs, Materials on the Canadian Legal Profession, Osgoode Hall Law School, York University, 1976.

45. Professional Engineers Act, R.S.O., 1970, c. 366, s. 9.

46. Public Accountancy Act, R.S.O., 1970, c. 373, ss. 1(c), 7(d).

47. For a discussion of the practical application of these rules and regulations to members of the legal and engineering professions see: H.W. Arthurs, Barristers - Barricades: Prospects for a Lawyer as a Reformer (1970) Western U. L.R. 59; Appendix D to the Research Director's Staff Study, "History and Organization of the Engineering Profession in Ontario," (1978).

48. See A.M. Carr-Saunders and P.A. Wilson, The Professions, supra note 18, p. 155.

49. Appendix C to the Research Directorate's Staff Study, "History and Organization of the Architectural Profession in Ontario" (1978).

50. "History and Organization of the Engineering Profession in Ontario", op. cit., supra note 47.

51. The Evolution of Professionalism in Quebec, supra note 3, Royal Commission on the Inquiry into Civil Rights, Report, No. 1, Vol. 3, op. cit., p. 1205. A.M. Carr-Saunders and P.A. Wilson, The Professions, supra note 18, p. 395.

52. L. Blades,"Employment at Will Versus Individual Freedom"(1967) 60 Columbia Law Review 1404, 1408-9.

53. See Government of Ontario, Task Force Report on Labour Relations (Woods) (Ontario: Queen's Printer, 1967, Recc #441).

54. R.S.C. 1970, c. P-35 as amended.

55. S.B.C. 1973, c. 122 as amended.

56. S.O. 1975, c. 72.

57. H.W. Arthurs, "Problems and Pitfalls from the Legal Point of View" in Collective Bargaining and the Professional Employee, Conference Proceedings, (Toronto: University of Toronto, Centre for Industrial Relations, 1965).

58. This conclusion conforms with the views expressed in "Rapport à L'Office des Professions du Comité d'Étude concernant la Deontologie Professionnelle dans les Conflits de Travail" (1977). That report argues that the use of professional codes is neither a necessary nor an effective way to regulate the concerted activity of employed professionals.

59. See especially our response to the findings of the L'Office des Professions in our section "Inapplicability of Self-Regulation for Salaried Professionals, in Chapter 3, as well as the section, "Ineffectiveness of Professional Societies" in Chapter 4.

60. J.-C. Baudouin, La Responsibilite civile et penal de l'employeur resultant de la violation des lois professionnelles (1976) 36 Revue du Barreau 175.

61. Labour Relations Act, R.S.N. 1970, c. 191, s. 2(1)(j) as amended, 1974 S.N. c. 98.

62. Trade Union Act. S.N.S. 1972, c. 19, s. 1(2).

63. P.E.I. Labour Act, R.S.P.E.I. 1974, c. L-I, s. 1(2)(a) as amended S.P.E.I. 1975, c. 17.

64. Labour Relations Act, R.S.O. 1970, c. 23 as am. 1975, S.O. c. 76, S. 1(3)(a).

65. Alberta Labour Act, R.S.A. 1970, c. 196, as am. S.A. 1973, c. 33 s. 49(1)(h)(ii).

66. Re York University and Osgoode Hall Faculty Association [1977] O.L.R.B. Rep. 611 (Oct.).

67. B.C. Labour Code, S.B.C. 1973, c. 122 as am. S.B.C. 1975, c. 33.

68. Saskatchewan Trade Union Act, S.S. 1972, c. 137.

69. 1943, S.O. c. 4.

70. Ibid., s. 5.

71. S. Goldenberg, Professional Workers and Collective Bargaining Task Force Study #2, 1967, supra note 40 at p. 208.

72. S.O. 1944, c. 29.

73. Quebec Federation of Professional Employees in Applied Science and Research, Unit #4, and Canadian Broadcasting Corp. Wartime L.R.B., 1946 CLLC 10,485.

74. British Columbia Distillery Co. Ltd. and Local 203 United Office and Professional Workers of America et al. Wartime L.R.B. 1947 CLLC 10,513, para. 12, 5, 3.

75. S.C. 1948, c. 54, s. 2(l)(i).

76. Labour Code of British Columbia, S.B.C. 1973, c. 122, s. 1(l).

77. Labour Code of British Columbia, S.B.C. 1975, c. 33.

78. R.S.O. 1972, c. 67 as amended S.O. 1974, c. 135, s. 1(l)(g)(iv).

79. S.B.C. 1973, c. 144 as amended 1975, S.B.C. c. 61.

80. Public Service Collective Bargaining Act, S.N. 1973, c. 123.

81. R.S.C. 1970, c. P-35 as amended.

82. Indeed the complete absence of any explanation for the initial exclusion of professionals from the Industrial Relations and Disputes Investigation Act, other than that it was pressed for by the Engineering Institute of Canada, (which was an association whose self-interest would induce it to be hostile to any other position) would suggest that there simply is none. See Debates House of Commons, Session 1948, Vol. IV, pp. 3208-3209.

83. Ontario Labour Relations Act, R.S.O. 1970, c. 232, as amended, s. 14.

84. See, for example, A. Kleingartner, Professionalism and the Salaried Worker Organization, supra note 3; M.R. McGuigan, "Arguments for and Against Collective Bargaining by Professionals" in Collective Bargaining and the Professional Employee, Conference Proceedings, 1965, (Toronto: University of Toronto, Centre for Industrial Relations); A.W.R. Carrothers, "Collective Bargaining and the Professional Employee", in Collective Bargaining and the Professional Employee, Conference Proceedings, ibid.; G. Strauss, "Professional or Employee Oriented: Dilemma for Engineering Unions" (1962), 14 I.L.R.R. 519, 532-33; S. Goldenberg, Professional Workers and Collective Bargaining, 1967 Task Force Study #2, supra note 40, pp. 146-197.

85. R. Woodsworth and R. Peterson, "Collective Negotiations in the Public and Professional Sectors", in Collective Negotiation for Public and Professional Employees (Scott, Foresman & Co., 1969) p. 7.

86. E. Kassalow, Prospects for White-Collar Union Growth, 5 Industrial Relations (Oct. 1965), p. 43.

87. S. Goldenberg, Professional Workers and Collective Bargaining, supra note 40, p. 84. And see the discussion at pp. 64 ff. supra.

88. Copies of agreements containing such provisions are on file with the Ontario Education Relations Commission.

89. See, for example, Article 12 of The Collective Agreement negotiated between the Treasury Board and the Professional Institute of the Public Service of Canada on behalf of the Medicine Group Code 217/74.

90. See Education Relations Commission "Teacher/Board Collective Agreements".

91. See S. Goldenberg, Professional Workers and Collective Bargaining, supra note 40 at pp. 85 and 255.

92. S. Goldenberg, ibid., at pp. 85, and 255-256.

93. D. Fraser and S. Goldenberg, Collective Bargaining for Professional Workers, 20 McGill L.J. 456, 464.

94. S. Goldenberg, "Professional Workers and Collective Bargaining" supra note 40 at p. 256. And see the recent arbitration award between the O.N.A. and the Mount Sinai Hospital (Globe & Mail, August 16, 1977), which recognizes the "right and responsibility" of the nursing profession at large to be involved in assessing quality and quantity of nursing care within a health agency.

95. See E.L. Britton, "Scope of Collective Bargaining" in Proceedings of the International Symposium on Public Employment Labour Relations 1971. C.W. Cheng, Altering Collective Bargaining, 1976; M. Mayer The Teachers' Strike (1969); P. Taft, United They Teach 1974. Arbitration Award - O.N.A. and Mount Sinai Hospital, supra note 94.

96. H. Wellington, and R. Winter, "Structuring Collective Bargaining in Public Employment", 79 Yale L.J. 805; Finkelman, Employer-Employee Relations in the Public Service of Canada (Ontario: Queen's Printer, 1976); F. Bairstow and L. Sayles, "Bargaining Over Work Standards by Professional Unions" in Collective Bargaining and Productivity I.R.R.A. 1975.

97. C.W. Summers, Public Employee Bargaining: A Political Perspective, 83 Yale L.J. 1156; D.H. Wollett, The Bargaining Process in the Public Sector (1971) 51 Oregon L. Rev. 176; D.H. Wollett, The Coming Revolution in Public School Management, 67 Mich. L. Rev. 1017 (1966); Mr. Justice L.G.B. Dickson, "Consultation, Planning and Decision-Making are Negotiable Items" ATA Magazine Sept.-Oct. 1971.

98. See 6 Journal of Law and Education 63 ff.

99. Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association 8 O.R. (2d) 65 (1975) (C.A.).

100. Dickson, "Consultation, Planning and Decision-Making are Negotiable Items" 171 ATA Magazine, pp. 25-26. And see N.W. Chamberlain, The Union Challenge to Management Control (1948).

101. This is confirmed by the action of Parliament in legislating the air traffic controllers back to work on specific terms and conditions of employment two days after a national walkout on August 7, 1977.

102. See, for example, S. Goldenberg, Professional Workers and Collective Bargaining supra note 40 at p. 86 ff. and 237 ff.

103. For a description of the genesis and abortive life of this model legislation which was put forward by a multi-professional group and spearheaded by the engineers in Ontario, see S. Goldenberg, Professional Workers and Collective Bargaining, ibid., at pp. 235 ff. and see D. Fraser and S. Goldenberg, Collective Bargaining for Professional Workers, 20 McGill L.J. 456.

104. Arguments for and Against Collective Bargaining by Professionals in Conference Proceedings, (University of Toronto: Centre for Industrial Relations, 1965) supra note 57 at pp. 35-42.

105. Ontario Labour Relations Act, R.S.O. 1970, c. 232 as amended, s. 59.

106. R.S.O. 1975, c. 72, s. 55.

107. (1959), 18 D.L.R. (2d) 346 (S.C.C.).

108. (1975), 54 D.L.R. (2d) 1.

109. McGavin Toastmaster Ltd. v. Ainscough, ibid., at p. 5-6 per Laskin, C.J.C.

110. J.I. Case Co. v. N.L.R.B. (1944), 321 U.S. 332, 338-339.

111. S. Goldenberg, Professional Workers and Collective Bargaining, supra note 40 at p. 96.

112. S. Goldenberg, Professional Workers and Collective Bargaining, ibid., at pp. 86-88; D.M. Beatty, Collective Bargaining in University Faculties, 30 Relations Industrielles 707.

113. J.I. Case Co. v. N.L.R.B. (1944), 321 U.S. 332.

114. C.M. Bailey, "The Experience of the Engineering Profession with Collective Bargaining 1976" op. cit., supra note 40.

115. D. Fraser and S. Goldenberg, Collective Bargaining for Professional Workers (1974), 20 McGill L.J. 456; S. Goldenberg, Professional

Workers and Collective Bargaining 1976 supra note 40.
P. Verge, "Problems and Pitfalls from the Legal Point of View" in Collective Bargaining and the Professional Employee, Conference Proceedings (U. of T. 1965: Centre for Industrial Relations).

116. Labour Relations Act, R.S.O. 1970, c. 232 as amended s. 1(3)(b).

117. Re C.S.A.O. and Ottawa General Hospital, [1974] O.L.R.B. Rep. 714.

118. S. Goldenberg, Professional Workers and Collective Bargaining, supra note 40 at p. 56.

119. R.S.Q. 1964, c. 141 as amended.

120. R.S.Q. 1964, c. 146.

121. J.R. Cardin, "Collective Bargaining and the Professional Employee in Quebec" in Collective Bargaining and the Professional Employee, Conference Proceedings (U. of T.: Centre for Industrial Relations 1965) pp. 81, 92.

122. See, for example, Canada Labour Code, R.S.C. 1970, c. L-1, s. 125(4); British Columbia Labour Code, S.B.C. 1973, c. 122 as amended, s. 47; Manitoba Labour Relations Act, S.M. 1972, c. 75, s. 2(2).

123. School Boards and Teachers' Collective Negotiations Act, S.O. 1975, c. 72, s. 65.

124. Re Toronto East General & Orthopaedic Hospital Inc., [1974] O.L.R.B. 671, 675.

125. Re Victoria Hospital, [1973] O.L.R.B. Rep. 498.

126. See, for example, Re St. Peters Hospital, [1975] 2 Cdn. L.R.B.R. 21 (Ont.)

127. Re Carleton University, [1975] O.L.R.B. Rep. 500; Re Vancouver City College, [1974] 1 Cdn. L.R.B.R. 298 (B.C.).

128. Re Toronto East General & Orthopaedic Hospital, supra note 124 at pp. 676-677.

129. Re McIntyre Porcupine Mines Ltd., [1975] O.L.R.B. Rep. 261, 297.

130. Re British Columbia Telephone Co., [1976] 1 Cdn. L.R.B.R. 273 (Can.).

131. Re British Columbia Telephone Co., ibid., p. 281.

132. Re Yarrows Ltd., [1975] 2 Cdn. L.R.B.R. 26; Re Victoria General Hospital 2 Cdn.. L.R.B.R. 30.

133. Finkelman: Employer-Employee Relations in the Public Service of Canada: Proposals for Legislative Change, (Ottawa: Information Canada, 1974), Part I, pp. 22 and ff.

134. See S. Goldenberg, Professional Workers and Collective Bargaining 1967, supra note 40 at pp. 59, 101; P. Verge, "Problems and Pitfalls from the Legal Point of View" supra note 115 at 107.

135. Re Usarco, [1967] O.L.R.B. Rep. 526.

136. Saskatchewan Trade Union Act, S.S. 1972, c. 137.

137. B.C. Labour Code, S.B.C. 1973, c. 122 as amended by S.B.C. 1975, c. 33.

138. Re Canadian Broadcasting Corporation, supra note 73.

139. Ontario Labour Relations Act, R.S.O. 1970, c. 232, as amended.

140. R.S.N.B. 1973, c. I-4.

141. R.S.C. 1970, c. P-35, as amended.

142. G.W. Adams, "Collective Bargaining for Salaried Professionals" op. cit., supra, note 19.

143. Re Northern Electric Co. Ltd. Dec. 1976, C.L.D. rev'ing [1975] O.L.R.B. Rep. 164.

144. R.S.C. 1970, c. L-1, s. 125(3) as amended.

145. C.C.S.M. c. L-10 as amended, S.M. 1972, c. 75.

146. Canada Labour Code, R.S.C. c. L-1, s. 107(1); Manitoba Labour Relations Act, S.M. 1972, c. 75, s. 1(5).

147. Canada Labour Code, ibid., s. 125(3).

148. Re Bell Canada, [1976] 1 Cdn. L.R.B.R. 345, 353 (Can.).

149. J.A. Willes, The Craft Bargaining Unit (Queen's University: Industrial Relations Centre, 1970) p. 29.

150. Re Steel Co. of Canada Ltd., 46 CLLC 16,463; Re Warnock Hersey Co. Ltd. [1966] O.L.R.B. Rep. 894.

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155. See National Labour Relations Act, 49 Stat. 449 (1935).

156. See S. Goldenberg, Professional Workers and Collective Bargaining, Task Force Study #2, supra note 40, at p. 65.

157. See The Evolution of Professionalism in Quebec, supra note 3 and see "History and Organization of the Engineering Profession in Ontario," supra, note 47 at p. 2.

158. [1976] O.L.R.B. Rep. 459.

159. Re Stratford General Hospital, ibid., p. 499.

160. G.W. Adams, "Collective Bargaining by Salaried Professionals" supra note 19 at p. 195. See also, for a similar conclusion, The Evolution of Professionalism in Quebec, supra note 3.

161. See Re Bell Canada, supra note 148; Re Western Electric Co. Ltd. (1960), 45 L.R.R.M. 1475 (N.L.R.B.).

162. Re Stratford General Hospital, [1976] O.L.R.B. Rep. 459, 500.

163. Re Niagara Regional Health Unit, [1975] O.L.R.B. Rep. 377, 381-383.

164. For example, see M. Skolnik, An Empirical Analysis of Substitution Between Engineers and Technicians in Canada, 25 Relations Industrielles 284 (1970), for empirical evidence of the substantial degree of substitutability between engineers and technicians in Canada.

165. Report of the Hospital Inquiry Commission, Nov. 1974, p. 42.

166. A recent example of just such a determination may be seen in Re York University & Osgoode Hall Faculty Association [1977] O.L.R.B. Rep. 611 (Oct.).

167. See S. Goldenberg, Professional Workers & Collective Bargaining, supra note 40 at p. 100.

168. Re Northern Electric Co. Ltd. December 1976, C.L.D. rev'ing [1975] O.L.R.B. Rep. 164.

169. [1976] O.L.R.B. Rep. 459.

170. See, for example, G. Strauss, Professional or Employee Oriented: Dilemma for Engineering Unions, 17 L.L.R.R. 519; S. Goldenberg, Professional Workers and Collective Bargaining, supra note 40 at pp. 209-251; J. Seidman and G. Cain, "Unionized Engineers and Chemists: A Case Study of a Professional Union" in R. Woodworth and R. Peterson, Collective Negotiations for Public and Professional Employees, 1969.

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172. See S. Goldenberg, Professional Workers and Collective Bargaining supra note 40 at p. 65; G. Strauss, "Professional or Employee Oriented: Dilemma for Engineering Unions" supra note 170 at p. 103, and "History and Organization of the Engineering Profession in Ontario," supra note 47 at p. 73.

173. E.J. Dvorak, Will Engineers Unionize (1963) 2 Industrial Relations 45.

174. Supra note 148.

175. Re Bell Canada, ibid., at p. 354.

176. S.O. 1972, c. 67, as amended.

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178. Re Stratford General Hospital, [1976] O.L.R.B. Rep. 459, 496.

179. Re University of Guelph, [1975] O.L.R.B. Rep. 327.

180. S.Q. 1973, c. 43.

181. R. Dussault, "Public Consultations on the Regulation of Professional Fees in Private Practice", Speech, February 20, 1976, p. 2.

182. See C. Castonguay, "The Future of Self-Regulation of the Professions", in The Professions and Public Policy op. cit., supra note 16.

183. R. Dussault and L. Borgeat, "La Reforme des Professions au Quebec", 34 Revue du Barreau 140; S. Goldenberg, Professional Workers and Collective Bargaining, supra note 40 at p. 72.

184. Fraser and Goldenberg, "Collective Bargaining for Professional Workers - The Case of the Engineers" 20 McGill L.J. 456.

185. See C.M. Bailey, "The Experience of the Engineering Profession With Collective Bargaining" unpublished paper prepared for the National Conference on the Professions and Public Policy, Law and Economics Programme, University of Toronto.

186. Report of the Task Force on Canadian Industrial Relations, (Queen's Printer, 1967) Recommendation #441; H.W. Arthurs, "Problems and Pitfalls from the Legal Point of View" in Collective Bargaining and the Professional Employee, Conference Proceedings, (Toronto: U. of T.: Centre for Industrial Relations, 1965) p. 101; D. Fraser and S. Goldenberg, Collective Bargaining for Professional Workers, 20 McGill L.J. 456, 477.

187. J. Crispo, Collective Bargaining and the Professional Employee Conference Proceedings (Toronto: University of Toronto: Centre for Industrial Relations, 1965), p. 100.

188. Ontario Labour Relations Act, R.S.O. 1970, c. 232, as amended.

189. Re Kelly Funeral Homes Ltd., [1973] O.L.R.B. Rep. 87.

190. The large scale corporate support for engineering and scientific societies in particular is documented in E. Hoffman, Unionization of Professional Societies, Conference Board Report, 690 (1976).

191. S. Goldenberg, Professional Workers and Collective Bargaining, Task Force Report, supra note 40, p. 71.

192. H.W. Arthurs, "Problems and Pitfalls from the Legal Point of View" Collective Bargaining and the Professional Employee, Conference Proceedings, supra note 186, p. 103.

193. See generally Chapter IV, "The Ineffectiveness of Professional Societies" at p. 67 ff., Bailey, "The Experience of the Engineering Profession with Collective Bargaining" 1976 supra note 40; Kleingartner, Professionalism and Salaried Worker Organization, supra note 3 at p. 110; S. Goldenberg, Professional Workers and Collective Bargaining, supra note 40, pp. 114-260; B. Goldstein, Unions and the Professional Employer, 27 Journal of Business 276, 280.

194. H.W. Arthurs, "Problems and Pitfalls from the Legal Point of View" in Collective Bargaining and the Professional Employee, Conference Proceedings, supra note 186.

195. See J.-R. Cardin, "Collective Bargaining and the Professional Employee in Quebec", Collective Bargaining and the Professional Employee, Conference Proceedings, supra note 121 at p. 88.

196. C.M. Bailey, "The Experience of the Engineering Profession with Collective Bargaining" supra note 193. S. Goldenberg, Professional Workers and Collective Bargaining, supra note 40, pp. 114-260. See also "History and Organization of the Engineering Profession in Ontario," supra, note 157.

197. H.W. Arthurs, "Problems and Pitfalls from the Legal Point of View" in Collective Bargaining and the Professional Employee, Conference Proceedings, supra, n. 186 p. 101.

198. Re C.S.A.O. National (Inc.) and Oakville Trafalgar Memorial Hospital Association (1972) 26 D.L.R. (3d) 63 (Ont. C.A.).

199. S.O. 1975, c. 72. A similar experience has prevailed in the teaching profession in Quebec, see S. Goldenberg, Professional Workers and Collective Bargaining, Task Force Study #2, supra note 40 at p. 74.

200. See S. Goldenberg, Professional Workers and Collective Bargaining, Task Force Study #2, supra note 40 at pp. 62-63.

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